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# THE TRAGEDY IN TORTS

Thomas C. Galligan, Jr.<sup>†</sup>

## I. INTRODUCTION

Personal injury cases are frequently compelling. The facts draw the relevant audience into the particular human tragedies out of which the legal disputes arise. Accidents change lives and, in personal injury litigation, the victims of accidents demand the legal system to hold someone else financially responsible for the changes those accidents have caused. Part of what makes these legal battles so compelling is the tension inherent in the adversarial system, a tension provided by the conflicting factual and legal perspectives the plaintiff(s) and defendant(s) bring to the case. These vying perspectives supply a friction which commonly rises to the level of true social drama.

In personal injury suits, legal rules fade out of view. Broad standards, like the "reasonable person" and "unreasonably dangerous," occupy decision-makers, not particularized dogma, like the mail box rule or the rule against perpetuities.<sup>1</sup> Consequently, decision-makers in accident cases have more legal room within which to roam. Tort law<sup>2</sup> itself provides the decision-maker with its great freedom to mete out "justice" in the particular case before the court. Arguably then, tort law is more responsive than other areas of private law to the specifics of the dispute and to the personalities involved.<sup>3</sup>

Torts' flexible responsiveness both results from and breeds the process of personal injury litigation. That process is dramatic; it is literary — it involves the unfolding of a story. Actually, it generates many stories, as many

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<sup>1</sup> The generality of tort law is what makes it responsive to particular events and what simultaneously makes it so troublesome because of its uncertainty. Careful examination might indicate other areas of law may be just as uncertain. What usually distinguishes these other areas is that their generality is a tad more shrouded. The generality of torts is right out in the open. Yet, tort's overt invitation to decision-makers to "do justice" in the particular case is one of its distinctive strengths.

<sup>2</sup> In this piece when I speak of tort law I am referring to that body of law most usually relevant in personal injury cases, i.e. negligence and strict product liability in tort. Thus, my discussion does not implicate most intentional torts, defamation, invasion of privacy, fraud, interference with economic gain (or contract, except insofar as I do discuss the economic harm rule in Section V), or fraud. Likewise, to keep the discussion limited I do not discuss liability for engaging in an ultrahazardous or abnormally dangerous activity. See generally, Thomas C. Galligan, *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 LA. L. REV. 323, 335-39 (1991).

<sup>3</sup> What does all this mean? It means that in tort law one sees what appears to be more case specific, less predictable, and more inconsistent results than are characteristic of other areas.

stories as there are agents involved in the relevant accident. At the trial, society's representatives listen to those stories. In the end, state sanctioned decision-makers pick one version of the story and so resolve the matter. This resolution results, more often than not, from the application of one of tort's expansive standards, such as the reasonable person, to the particular facts. When the resolution results from the decision of a jury the *law* behind the case is hidden in the jury room, hidden behind broad, general, jury instructions full of words like "reasonable," "unreasonable," "foreseeable," "remote," "natural," "probable," "cause," and "proximate." Where the judge is the applicable decision-maker her decision is couched in similarly broad, metaphorical terms. This is so whether the judge decides the case as factfinder *or* as law giver. Indeed where issues of proximate cause or duty/risk are involved it is often hard to distinguish fact from law from mixed law and fact. Appellate decisions in many tort cases are no more precise.

To reiterate this piece's leitmotif, in personal injury cases plaintiffs petition the government for redress; that petition is personal and specific. The plaintiff sues not so much as a part of a class or group but on his or her own behalf. She tells her story, not someone else's story. She demands compensation from some other, specific person. Likewise, the defendant tells its story. Sometimes, the defendant is an entity, or the defendant is represented by an insurance company. But, even then, the defendant tells its story through the voice of the responsible corporate agent, be she managing agent or delivery person. By like token, when the insurer is paying the defense lawyer and facing a potential judgment, the story the court hears is the insured's story, not the insurer's.

What is the importance of the specific story in tort cases? The specific story dominates the stage. The law's generalized standards accommodate the details of the case. Broad standards invite particularistic, event specific versions of what happened. The detailed story matters more than it might in a legal landscape of detailed, particularistic rules. When the story matters, the individuals matter. The litigants and those whom they call as witnesses become actors in a play, a play about what happened, and each of the characters matter. Not only do they matter as parties to a lawsuit but they matter as individuals. Like characters in a play or story the parties display real, human characteristics. The litigants and witnesses, as characters, reveal traits that interest us. These traits provide the depth that makes the characters interesting; without their own particular human traits they are caricatures, not real characters.

Paradoxically, while detail provides specificity and uniqueness it simultaneously opens out to commonality and similarity. Falling back on cliches, each person's uniqueness is part of what makes him or her like everyone else. While people share general physical and mental traits the variations among us are infinite, i.e., our tastes, what we believe, what we are afraid of, how we love, the combination of these and other characteristics. In

an odd sort of a way we share our uniqueness. I am certain, to the extent that is metaphysically possible as I write this, no one has ever or will ever be me. There are people who look like me and talk like me and laugh like me and think like me, but no one with the same, precise combination of attributes. My children crinkle their brows in a way I have watched in the mirror. When my children laugh or play or face fear I know their feelings. But while we are alike we are also ineluctably and ineffably different. They are them and I am me. There has never been another me and, miraculously enough, each of them is just as unique and different as I am. By being different we are the same.

In our culture we place a high value on personal identity, not just personal liberty per se, although that is part of the package I am talking about. Ironically, as I perceive the uniqueness of another I appreciate my own individuality more. Tautologically, as a result, I value the uniqueness of that other person more. To further pile syllopcism on syllopcism, focusing on the individuality of another illogically highlights the common link we share. Psychologically, awareness of the common link makes me better able to empathize with that other — the empathic reaction is compassionate. Circuitously then, emphasis on individuality, a trait we all share, points to commonality which, in turn, produces compassion.

Returning to the development of detail in story, one comprehends its importance. Detail puts meat on the bones of the character's skeleton. The provision of detail allows the reader or observer to consider the character as someone more real. That reality stems from the character's universal uniqueness. Grasping the character in its uniqueness, we grasp what we see in ourselves. We empathize. Thereafter, we are better able to see the world through the character's eyes. Familiarity points to generality; it breeds understanding and compassion.

Vicarious experience allows for another, related phenomenon which, along with compassion, also arises out of empathy. Vicarious experience allows one to see or "go through" an experience without actually going through it. To wit, let me turn to Karen Armstrong's interpretation of Aristotle's view of the dramatic form of tragedy. Ms. Armstrong writes that:

[Aristotle's] . . . famous literary theory . . . [was] that tragedy effected a purification (*catharsis*) of the emotions of terror and pity that amounted to an experience of rebirth. The Greek tragedies, which originally formed a part of a religious festival, did not necessarily present a factual account of historical events but were attempting to reveal a more serious truth. Indeed history was more trivial than poetry and myth. . . . [T]here may or may not have been a historical Achilles or Oedipus, but the facts of their lives were irrelevant to the characters we have experienced in Homer and Sophocles, which express a different but more profound truth about the human condition. Aristotle's account of the *catharsis* of tragedy

was a philosophic presentation of a truth that *Homo religious* had always understood intuitively: a symbolic, mythical or ritual presentation of events that would be unendurable in daily life can redeem and transform them into something pure and even pleasurable.<sup>4</sup>

While Ms. Armstrong writes about the metaphysically revealing power of tragedy, torts may well have a tragic value for our society. The tragedies of the ancient Greeks dealt with mythic characters who were presented with unendurable events. Both those events and how the protagonists dealt with those events shed some metaphorical light on the meaning of life. Perhaps the same is true of torts.

In real life personal injury cases modern America is confronted with the plight of young Mr. Grimshaw,<sup>5</sup> seriously burned in a Ford Pinto, with the moral dilemma of holding a manufacturer liable for a risk it did not know of at the time it designed its product.<sup>6</sup> Thus we focus on the real life personal disaster of Grimshaw, not the mythical, near psychotic self-absorption of Achilles. In torts, we confront holding a manufacturer liable without fault, not the blind guilt Sophocles and the Gods piled on Oedipus. But, in a way, the real life actors in modern day tort suits occupy a mythical stage no less meaningful than the one on which actors playing Achilles and Oedipus performed. Like the protagonists in the Greek dramas Ms. Armstrong and Aristotle discuss, the protagonists in our tort suits have endured the unendurable. By vicariously confronting those unendurable events, by considering them after the fact, perhaps we redeem ourselves somehow. Perhaps a society, by either awarding compensation or absolving one of liability, symbolically states some truth about its core beliefs and its concepts of justice.

By considering the details of particular cases, often involving terribly irreversible injuries, we see not just the individual actors but how those individuals also represent the rest of us. Like the reader of a tragedy we experience empathy, seeing the world through a broader lens. The empathic reaction, in turn, triggers a compassionate response in the individual case. Case specific, compassionate justice is what the flexibility of torts potentially provides.

In this piece I intend to examine some of the assumptions I have made in the preceding paragraphs. For one, I intend in the next section, Section II, to reiterate the inherent flexibility of the reasonable person standard. In so doing I will note that the standard allows individual actors to tell their particular

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<sup>4</sup> K. ARMSTRONG, *A HISTORY OF GOD*, 37 (1993).

<sup>5</sup> See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. App. 1978).

<sup>6</sup> See Gary C. Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases*, 77 NW. U. L. REV. 1 (1982).

stories to judges and juries, free of some of the confines of traditional legal doctrine. Next, in Section III, I will turn to some other ways in which torts allows particular decision makers vast leeway in deciding particular cases. Here, I will primarily discuss legal cause and some alternative approaches to limiting liability. In Section IV, I will note the traditionally flexible role of compensatory damages in tort cases, including awards for general damages, like pain and suffering and mental anguish. Therein, I also discuss the case specific justice contemplated by the modern doctrine of comparative fault. Following that, in Section V, I note some historical and current limits on the flexibility of personal injury law. In Section VI, I will re-consider what I have written about torts, tragedy, generality, and compassion in light of modern tort theory, setting forth some brief concluding remarks as well.

## II. THE BENDABLE, BREATHABLE, UNBREAKABLE REASONABLE PERSON STANDARD

In 1830s England, Menlove built a hay rick near the boundary between his land and Vaughan's land. Despite repeated warnings of the risk of combustion, Menlove did not move the hay rick. Instead, Menlove told listeners his stock was insured and "he would chance it."<sup>7</sup> The risk with which Menlove was willing to gamble transpired. The rick burst into flames. The conflagration consumed Menlove's barn and stables before jumping to some cottages on Vaughan's property. The fire destroyed the cottages. Vaughan sued Menlove in negligence to recover his damages.

The trial court instructed the jury that in determining whether Menlove was negligent,<sup>8</sup> it must decide whether Menlove proceeded "with such reasonable caution as a prudent man would have exercised under such circumstances."<sup>9</sup> The jury found for Vaughan but the court ordered a new trial ("a rule nisi . . . was obtained"<sup>10</sup>), concluding it was improper to hold Menlove to a standard of ordinary prudence. Instead, the court should have told the jury that the issue was whether or not Menlove had "acted bona fide to the best of his judgment. . . ."<sup>11</sup> Put differently, the basis for the new trial was essentially that the court *should* have told the jury to determine negligence using a subjective standard *not* an objective standard.

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<sup>7</sup> Vaughan v. Menlove, 132 Eng. Rep. 490, 491 (1837).

<sup>8</sup> Actually, the issue before the court was whether Menlove was grossly negligent; however, for the modern reader the grossness of the negligence adds little.

<sup>9</sup> 132 Eng. Rep. at 492.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

On appeal, the court reversed, and Chief Justice Tindal's opinion is now frequently included or discussed in case books<sup>12</sup> as one of the leading early cases setting forth the reasonable person standard. In rejecting the subjective standard, Tindal wrote:

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.<sup>13</sup>

Thus, the Chief Justice and the court rejected the best judgment of the individual (the subjective standard) in favor of the reasonable person standard (an objective standard) because, I take it, the subjective standard would be too unpredictable and would allow for too much variation.

Instead of a subjective standard, we are left with and keep the objective standard of the reasonable person under the circumstances. In reference thereto, Prosser and Keeton write:

The whole theory of negligence presupposes some uniform standard of behavior. Yet the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court. The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites. At the same time, it must make proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act. The courts have dealt with this very difficult

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<sup>12</sup> See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 129 (5th ed. 1990); M. FRANKLIN AND R. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 46 (5th ed. 1992); J. WADE, ET AL., *PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS* 143 (9th ed. 1994).

<sup>13</sup> 132 Eng. Rep. at 493. One notes the Chief Justice is borrowing a metaphor. By 1837, Selden had already complained that in equity, because of the Chancellor's vast discretion, one's right to relief varied with the size of the Chancellor's foot. See D.B. Dobbs, *Handbook on the Law of Remedies*, § 2.2 at 61 n. 8 (Student Edition, 2d ed. 1993). One wonders whether Tindal hoped he was keeping that type of discretion out of tort law by adopting an objective standard. If so, one must conclude in retrospect that he failed.

problem by creating a fictitious person, who never has existed on land or sea: the "reasonable [person] . . . of ordinary prudence."<sup>14</sup>

Clearly, a standard, as opposed to a rule, seems desirable because it is able to meet changing and unforeseeable circumstances.<sup>15</sup> It allows the factfinder to respond to the circumstances and to tailor its decision of what is reasonable conduct to the particular circumstances before it. In their classic, *The Legal Process*, Hart and Sachs discuss the difference between rules and standards:

The most precise form of authoritative general direction may conveniently be called a *rule*. . . . [A] rule may be defined as a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events — that is, determinations of *fact*.

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Unlike a rule, the application of a standard requires something more than a determination merely of the happening or non-happening of physical or mental events. It requires a comparison of the quality or tendency of what happened in the particular instance with what is believed to be the quality or tendency of happenings in like situations. A standard can be defined broadly as a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspect of general human experience.

Even more obviously than the inchoate rule, the standard involves a postponement of the decision until the matter can be judged from the perspective of the point of application. Indeed, unless elaborated it

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<sup>14</sup> W. P. KEETON, ET AL., PROSSER AND KEETON ON TORTS § 32, at 173-74 (5th ed. 1988).

<sup>15</sup> One is reminded of the advent and inevitable demise of various "rules of law" courts used to define negligent conduct. Ultimately, Justice Holmes' view, see OLIVER W. HOLMES, THE COMMON LAW 99 (M. Howe, ed. 1963), that over time trial judges should need juries less and less in negligence cases gave way to an approach that asked the jury in each case to determine whether or not the defendant acted reasonably no matter what the judge herself might have decided if acting as factfinder and no matter what decision on "reasonableness" was reached by a factfinder in a previous case. See generally Thomas C. Galligan, "Hill v. Lundin & Associates" Revisited: Duty Risked to Death? 40-64 (LSU Law Center Publications Institute 1993).



does more than this, and avoids even at that point the imprisonment of general judgement in any precise verbal formula. The meaning of standards such as "reckless," "generally fair and equitable," and "due care" depend upon the feeling for the particular type of situation of the individual standard-applier. Different appliers may apply them differently. The standard thus represents a looser form of control than the rule.<sup>16</sup>

The looser form of social control, the standard, preserves and even encourages flexibility.

But, why the presupposition of a uniform standard of behavior at all? Why the need to hypothesize when we know human behavior may vary with the direction of the wind? Why does the community demand an external, objective standard? Why must the standard allegedly be the same for all people? Why not use a subjective standard after all? The need for an external standard, albeit one that postpones decision and defies certainty, may arise from the notion that if the law held each of us to a subjective standard, each of us would, in a way, be the judge of our own conduct. As part of a community, no single person can decide what is acceptable conduct. A party cannot be the judge in his own case. Put differently, a performer cannot be her own audience. Even the libertarian who proclaims one's right to choose what is best for him or her agrees that one's freedom to do as she chooses stops when she injures her neighbor.<sup>17</sup> Professor Ernest Weinrib, the modern champion of Aristotle's theory of corrective justice, albeit with a natural rights flair, notes that wrongful interference with the will and/or embodiments of the will of another exposes the actor to liability in tort.<sup>18</sup>

The desire to hold each of us to the *same* standard no doubt stems from an underlying devotion to equality. All people are supposedly equal in the eyes of the law. It appeals to our sense of what's right. It appeals to our notion that equality of treatment is a good towards which we strive. It also appeals to our idea that legal decisions ought to be based on abstract principles. It is consistent with the notion Professor Dan B. Dobbs articulated when discussing equity: people in our democratic society believe justice entails being held to a rule of law not to the discretion of some authoritative individual.<sup>19</sup> Moreover, to return to my dramatic/storytelling theme, the

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<sup>16</sup> HERBERT L. HART AND ALBERT M. SACKS, *THE LEGAL PROCESS* 157, 159 (Tentative Draft 1958). Actually Hart and Sacks saw the reasonable person standard as a somewhat more elaborated standard than due care. *See id.* at 159.

<sup>17</sup> *See* EPSTEIN, *supra* note 12, at 130.

<sup>18</sup> Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992).

<sup>19</sup> DAN B. DOBBS, *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 61-62 (2d ed. 1993).

subjective standard would overemphasize the individual defendant. My thesis is generality leads to specificity which, in turn, leads back to generality. One might conclude a subjective standard would not provide that jump from the specific back to the general.

No doubt the desire to maintain the reasonable person standard as an abstract principle is what has led the courts to guard the mythical reasonable person so carefully. Jurors are not allowed to put themselves in the position of the defendant and ask what they would have done.<sup>20</sup> They are also not allowed to put themselves in the plaintiff's position.<sup>21</sup> They must, when considering the defendant's conduct, decide what the hypothetical reasonable person would have done, not what any particular person would have done. Interestingly, this tendency ties in to my discussion in the introduction. By focusing on the details of the conduct involved in the particular case, the jury paradoxically moves beyond those sad details to the human condition in general. Detailed consideration of facts leads to a deeper understanding of the individuals involved which leads to a more meaningful understanding of the human community involved, the community whose hypothetical standard is the yard stick by which the factfinder measures the defendant's conduct. The standard may act as the divining rod through which that translation from specific to general occurs. I will return to these ideas again later.

For now, accepting the fact that society has devoted itself to an objective standard for any number of reasons, let us consider the stark reality of that standard's predictive meaning for primary behavior. Arguably, the standard has little substantive meaning outside particular cases. In fact, it may have no more real consistent substance than a subjective standard would have. The objective standard requires each of us to act as a reasonable person under the circumstances. But it is those particular circumstances that make each life and each incident in each life unique. The circumstances make life interesting. We are born; we live; we die. To make the story interesting, to make it worth following, we yearn for more. We want to know the circumstances. We want detail.

What I may permissibly do while driving on a dark night, on a lonely road, on my way to the emergency room with my youngest child is radically different from what's permissible while I drive home from work alone on a crowded highway, trying to get to my "almost 40 and over" softball game. What law do we get out of these hypotheticals? The closest I can come is the

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<sup>20</sup> *Freeman v. Adams*, 63 Cal. App. 225, 218 P. 600 (Ct. App. 1923).

<sup>21</sup> *See, e.g., Beagle v. Vasold*, 417 P. 2d 673 (Cal. 1966); DOUGLAS F. LAYCOCK, *MODERN AMERICAN REMEDIES* 140 (1993).

emergency doctrine which considers emergencies as circumstances meriting special attention in determining reasonable care.<sup>22</sup> Some help?<sup>23</sup>

Thus, the reasonable person "standard" invites the parties to a particular dispute to point to the particularities of the incident at issue. These particularities may include consideration of the relevant peculiar characteristics of the defendant (even if *de facto*), or when contributory negligence is at issue, the plaintiff.<sup>24</sup> Thus, the parties are allowed to tell their versions not only of the event but how the other party reacted to the event. They are allowed to dramatically recreate the episode for the relevant decision maker. The decision maker then renders a decision whose predictive value is typically close to none; this is especially true in jury trials.<sup>25</sup> The next case, even one with remarkably similar facts, is governed not by the jury's decision in the prior case but rather by the general "due care/reasonable person" standard. That is, for the next story we go back to ground zero; we do not force the next decision maker to pick up where the last one left off.

Importantly, the reasonable person standard allows tort law, as Hart and Sacks noted, to defer decision. It defers decision until the trial so that the factfinder determines what is reasonable "judged from the perspective of the

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<sup>22</sup> See, e.g., KEETON ET. AL., *supra* note 14, § 33 at 196-97.

<sup>23</sup> While the facts of individual cases vary, the law itself has expressly altered the reasonable person standard by "codifying" certain circumstances. This is the case with the "emergency doctrine" referred to above. By way of further example, the law has long taken physical attributes into account in deciding what is reasonable care. The person who cannot see is held to the standard of the reasonable person who cannot see. The person who cannot hear is held to the standard of care of the reasonable person who cannot hear. Perhaps, most notable of all is the fact that children, unless engaging in adult or particularly dangerous activities, *Id.* § 32 at 181-82, are held to the standard of children of like age, intelligence, and experience. *Id.* at 179-82. Each child is essentially held to the standard of a hypothetical child who has her attributes and background. This the spot where a subjective and objective standard truly merge.

Now, in hostile work environment sexual harassment cases, courts are wrestling with using a reasonable woman standard when a female is the victim of alleged harassment. See, e.g., Kathryn. Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Naomi R.. Cahn, *The Looseness of Legal Language, The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992). Cf. Ronald K. F. Collins, *Language, History, and the Legal Process: A Profile of the "Reasonable Man"*, 8 RUTGERS-CAMDEN L. J. 311 (1977).

<sup>24</sup> I use the phrase contributory negligence here to refer to plaintiff's failure to exercise due care. I use it to include the relatively few jurisdictions where the effect of the plaintiff's fault is to bar recovery or the vast majority where the effect of plaintiff's fault is merely to reduce recovery. One will note that even in many comparative negligence jurisdictions if the plaintiff's fault exceeds some specified level (either 50% in some or 49% in others) the effect is to bar recovery.

<sup>25</sup> Where the judge decides the case as factfinder then perhaps the judge's decision has more practical predictive value because the decision in the case may provide some insight into the judge's values and biases; however, even then the predictive value has more to do with what the particular decision reveals about the judge, *not* what it says about the "law."

point of application.”<sup>26</sup> Critically, the factfinder’s decision, its application of the standard, may be based not so much on the cold logic of the law<sup>27</sup> as on the factfinder’s feeling for the warm reality of the particular case. Here, once again, it is important to note the particular words Hart and Sacks used to describe standards and their application. They said, as I quoted above, application of the standard depends upon the “*feeling* for the particular type of situation of the individual standard-applier.”<sup>28</sup> The parties’ respective versions of the event evoke a feeling and, as Hart and Sacks noted, this “*feeling*” is critical to the resolution of the case.

One may pause here with some concern. Aren’t the factfinders supposed to compare the conduct of the allegedly at fault parties with the abstract standard of the reasonable person? Hart and Sacks seemed to contemplate such a comparison. Whatever analytic process supposedly goes on, Professor Grady has persuasively pointed out that the principled comparison between ideal and actual is not what happens in practice. In his seminal article, *Untaken Precautions*,<sup>29</sup> Professor Grady argues that, in practice, lawyers identify particular “untaken precautions” which then serve as the heart of the case. The party claiming breach of the appropriate standard of care points to some particular precaution which the defendant failed to take. That particular alleged failure (or failures<sup>30</sup>) then becomes the key to the case. Plaintiff says the defendant should have taken the untaken precaution without which the accident would not have occurred. Defendant claims the untaken precaution may not have been reasonable behavior, or at least that what it did was reasonable. The parties fight over the details. The detail makes the dispute more concrete; it makes it more focused and it makes it more dramatic. Rather than fight at the abstract level of the “standard of care of the reasonable person,” the parties argue over the details of what the reasonable person would have done under the particular circumstances and what the reasonable person might have done to prevent the accident.<sup>31</sup>

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<sup>26</sup> HART AND SACKS, *supra* note 16, at 157.

<sup>27</sup> In a jury trial, the judge explains the “law” to the jury in a jury instruction on the reasonable person standard that may take all of ninety seconds to read.

<sup>28</sup> HART AND SACKS, *supra* note 16, at 157 (emphasis supplied).

<sup>29</sup> 18 J. LEGAL STUDIES 139 (1989).

<sup>30</sup> It seems more realistic to say “those failures” because parties frequently point to multiple alleged incidents of particular negligence which their adversaries allegedly committed.

<sup>31</sup> Here one notes the relevance of what is now probably the majority rule that a plaintiff in a failure to design product liability case must establish there was some alternative design which would have lessened or prevented the plaintiff’s injuries in order to establish a *prima facie* case. See, e.g., La. R.S. 9:2800.56(1). This is the position which the drafters of the Restatement (Third) of Torts-Product Liability have taken. RESTATEMENT (THIRD) OF THE LAW OF TORTS: PRODUCTS LIABILITY § 2(b) (Tentative Draft No. 1, 1994). While this rule is relevant to the current discussion, I have several bones to pick with it, which I will save until

Grady's untaken precautions analysis is important not only because it emphasizes the rich detail of the actual case but also because, by emphasizing the detail, it de-emphasizes the pure objectivity of Chief Justice Tindal's objective standard. Applying, measuring, and even setting the standard of care is much more case specific than Tindal's traditional theory would admit. Not only is it specific because it takes account of the details of the surrounding circumstances, including party specific character traits, but also because, according to Grady, application of the standard involves a decision between what the allegedly negligent party actually did and some *particular* undone thing it allegedly *should* have done. Thus, detail replaces broad principle. The reasonable person standard, by definition, welcomes this detail. Indeed it is the detail that makes things interesting.

Let me now pause and consider the reasonable person standard from two post-modern perspectives: the Learned Hand formula's economic emphasis and Professor Leslie Bender's feminist view of the standard. I turn first to Judge Hand, and his disciples.

According to the Learned Hand formula one is negligent if the burden of avoiding a risk is less than the probability of that risk occurring times the anticipated gravity of the risk if it should arise.<sup>32</sup> Thus, the actor is negligent if the ex ante cost of avoiding the risk is less than the discounted "value" of that risk.<sup>33</sup> The Hand formula is an economic definition of negligence; under the formula an actor is negligent if the marginal cost of a particular identified untaken precaution, to use Professor Grady's term,<sup>34</sup> is less than the marginal benefit the untaken precaution would have provided.<sup>35</sup> The Hand formula supposedly encourages efficient investments in accident avoidance. In the laboratory, it neither under- nor overdeters. Is the Hand formula consistent with the storytelling/tragic role I have identified for tort law, particularly negligence law?

I have contended that the reasonable person standard allows the jury to decide particular cases in case specific ways. I have argued that the standard we use to define the required care essentially frees the jury to decide the case as it sees fit. The Hand formula, if applied per its theoretical basis, constrains that freedom somewhat. Under the formula, the jury must expressly consider costs and benefits, it is limited to a cost/benefit analysis of the case before it. While the Hand formula has not totally replaced the generalized reasonable

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#### Section V.

<sup>32</sup> See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

<sup>33</sup> See Thomas C. Galligan, *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 14-23 (1991).

<sup>34</sup> See Grady, *supra* note 29, at 140.

<sup>35</sup> See Galligan, *supra* note 33, at 14-23.

person standard,<sup>36</sup> as Professor Stephen Gilles has pointed out, no court has expressly repudiated the Hand formula and cost/benefit analysis has indeed come to dominate the way scholars think about negligence and how many courts talk about it.<sup>37</sup> Thus, the Hand formula certainly cannot be ignored. As noted, the formula's express reference to costs and benefits somewhat limits the factfinder's ability to roam free amidst its own case specific sense of justice.

I have contended above that part of the psycholiterary value of torts is to allow the factfinder to focus on the details of the case before it, including the details revolving around the parties before the court. After focusing on that detail and only after focusing on that detail does the factfinder make a decision in the case, i.e., for present purposes, whether the defendant acted as the reasonable person under the circumstances. What a society studying tort cases learns about humanity it learns by focusing on detail until detail triggers some empathic response which, in turn, leads to some understanding about more than just the details of the case before the court.

Alternatively, the Hand formula can be viewed as a utilitarian formula striving to produce the greatest good for the greatest number. It encourages efficient investments in accident avoidance and efficiency is supposedly good for all of us. By encouraging efficiency in individual transactions or pseudo-transactions, like accidents, society hopes for the greatest good for the greatest number. Thus, unlike the focus on the individual that the story telling model of torts contemplates, the Hand formula focuses on the individuals involved and the incidents involved only as means to some greater end — efficiency.

As noted, the Hand formula is not value neutral. It encourages efficiency. Tort cases are a means to an end — efficiency. The storytelling/tragic view of negligence is more metaphoric. While not value neutral it contemplates the confluence of many values, all relevant values. It contemplates value comparison or melding; it is not devoted to any one value. Like any metaphor, it defies, in part, logical explanation.

Despite these apparent inconsistencies between the Hand model of negligence and the storytelling model, the two models might still co-exist. Efficiency is a value in our culture. There is no disputing that; indeed, it is an important value. One of the things the broad standards of negligence, like the reasonable person, allow the factfinder to do, as Professor Catherine Pierce Wells has pointed out,<sup>38</sup> is to pour community standards regarding what is "just" into the tort system as it decides particular cases. One of the values the factfinder may, or perhaps even should, take into account in our society is

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<sup>36</sup> See Stephen G. Gilles, *The Invisible Hand Formula*, 80 U. VA. L. REV. 1015 (1994).

<sup>37</sup> *Id.* at 1016.

<sup>38</sup> Catherine. P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

efficiency. Thus, the Hand formula may be a factor, but perhaps not the *only* factor in the factfinder's application of the reasonable person standard, i.e., in the way the factfinder interprets the stories it hears from the parties and the witnesses. Perhaps this is why, as Professor Gilles has noted, the Hand formula has not replaced generalized due care language in jury instructions in negligence cases.<sup>39</sup>

But if the Hand formula stands for only one value, why don't courts expressly apply a combination of the Hand formula and the reasonable person standard? To answer that question let me consider Professor Gilles' recently articulated theory of the Hand formula. Gilles contends that the reasonable person standard may serve as a heuristic. The American Heritage Dictionary says heuristic is an adjective meaning: "Of or relating to a usually speculative formulation serving as a guide in the investigation or solution of a problem. . . ."<sup>40</sup> As a noun then, a heuristic is something which may serve as a guide to solving a problem. Here the reasonable person standard, as heuristic, is a guide to defining negligence under the Hand formula. The heuristic (the reasonable person standard) allows the jury to apply the Hand formula *without* first converting the costs and benefits associated with risks and untaken precautions into "utiles" (a standard unit of economic exchange) which can be balanced against one another.<sup>41</sup> Rather than convert to utiles, the "reasonable person heuristic appeals to the factfinder's experience and knowledge of the average community member's valuation of precautions and safety risks."<sup>42</sup> Under the Gilles' model, the reasonable person standard is the tort system's way to rely on "factfinder notice"<sup>43</sup> of the utility or value associated with the Hand factors rather than having to elicit expert testimony on the subject.<sup>44</sup> In that vein, the Hand formula and the reasonable person test operate side by side. The Hand formula defines negligence and the reasonable person standard facilitates the formula's application. The standard allows the factfinder to weigh costs and benefits in "colloquial" terms. However, note that under the Gilles' model, the Hand formula *defines* negligence. The efficiency the formula strives to achieve *is the* end value negligence law serves. Efficiency is not just one value a society may want to factor in as part

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<sup>39</sup> Gilles, *supra* note 36, at 1016-19, 1022-24.

<sup>40</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 849 (3d ed. 1992) (first definition).

<sup>41</sup> Gilles, *supra* note 36, at 1029-32.

<sup>42</sup> *Id.* at 1032.

<sup>43</sup> *Id.*

<sup>44</sup> Of course, under the Gilles' theory one would conclude that even though the system relies on factfinder notice, rather than expert testimony, in most cases expert testimony would still be admissible, even in the run of the mill case.

of a more or less metaphorical decision making process. Rather, it is the only value negligence law should seek to achieve.

As I said, perhaps it is because tort law still views efficiency as just *one* of the factors relevant to what is reasonable that the Hand formula has not generally replaced "reasonable care" as the measuring rod for negligence. Thus the Hand formula serves one value; the dramatic/storytelling "model" accommodates many but with no prescription as to how to weigh those values (or emotions). This is the critical difference between the Hand formula and the storytelling model but one should also note an important similarity.

Although the Hand formula forces an analysis of costs and benefits and strives to achieve one value — efficiency, its practical application, like the stories parties tell, is potentially case specific. The Hand formula allows the parties to focus in on the detailed costs and benefits at issue in the case before the court. While I admit I am no economist, one of the few economic facts I think I know is that almost everything can be valued. I will return later to the idea of the incommensurable. But for now, assume almost everything can be valued in some economic sense. Additionally, almost anything can be viewed as a cost or benefit of something else. Thus, there are direct costs, information costs, and transaction costs, to name a few. Consequently, given the breadth with which economics paints, the Hand formula may not tie the hands of the factfinder quite as much as one might at first believe. Perhaps people consider costs and benefits of alternative modes of behavior whether they consciously know it or not.<sup>45</sup> Assuming that to be the case, the Hand formula essentially tells juries in negligence cases to do what they would do anyway without drastically limiting the power of the parties, their lawyers, or the factfinder to use dramatic detail to tell the story of efficient and/or inefficient conduct.

Now, as promised, let me pause over the idea of incommensurability. The legal economist relies upon the notion that harm (or injury) can be equated with a dollar value — that harm and money are commensurables. Professor Radin has called this a comodified concept. She writes: "A comodified conception of compensation, in which harm to persons can be equated with a dollar value, coexists with a noncomodified conception, in which harm cannot be equated with dollars. In the comodified conception harm and dollars are commensurable, and in the noncomodified conception, they are incommensurable."<sup>46</sup> To simplify matters, we can assume awards for lost past earnings and lost future earning capacity are commensurable with dollars. We can also assume the same for past and future medical expenses, which would include awards for medical monitoring. What are potentially

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<sup>45</sup> See Gilles, *supra* note 36, at 1032-34.

<sup>46</sup> Margaret J. Radin, *Essay: Compensation and Commensurability*, 43 DUKE L. J. 56 (1993).



incommensurable in dollars are a person's past and future pain and suffering, mental anguish, disfigurement, and loss of enjoyment of life.<sup>47</sup>

What does this mean for the Hand formula? It seems that just as the Hand formula has the capacity to consume<sup>48</sup> the elements of negligence as we knew them before law and economics championed the formula,<sup>49</sup> the notion that harm (personal injuries) and money are not commensurable shatters the formula. This is because the formula depends upon society (courts and juries) being able to somehow (if even intuitively) "value" harm in dollars. Both the anticipated loss (L) and the burden of avoiding (B) loss require at least the theoretical ability to value harm.<sup>50</sup> If, in fact, harm and dollars are not commensurable then damage awards for incommensurables are nothing more than haphazard (random) guesses about what harm might be worth in dollars if in fact the equation could be made, which it cannot.

Nor does Professor Gilles' hypothesis about what he calls "factfinder notice" take care of this problem. He opines that reliance on factfinder notice allows the jury to evaluate harm and safety in terms of community values without the necessity of expert opinion (or precise Hand formula instructions). However, the decision maker does *make the valuation* under Gilles' model. If, in fact, there is no way to value harm in dollars there is no relevant fact of which the factfinder has notice.<sup>51</sup>

Put simply, if harm and dollars are incommensurables, damage awards for pain and suffering and emotional distress are either arbitrary or serve some goal other than efficiency, or both. Some legal economists accept the notion

<sup>47</sup> The tort lawyer may conveniently think of these categories of damage as general damages.

<sup>48</sup> See Thomas C. Galligan, *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1530 (1993).

<sup>49</sup> See, e.g., Richard. Posner, *A Theory of Negligence*, 1 J. LEGAL STUDIES 29 (1972).

<sup>50</sup> B requires one to be able to value harm because an alternative course of conduct may pose a risk of another type of injury which the defendant's conduct avoided. Thus, in order to accurately determine B, the decision maker must be able to pin a dollar value on those other injuries which the alternative course of conduct may pose.

<sup>51</sup> As Professor Gilles notes in part, "[t]here is a growing body of literature dealing with the issue of whether some value are 'incommensurable' in ways that preclude cost-benefit analysis, reasonable choices, or both." Gilles, *supra* note 36, at 1033, n.43. See also, Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2145-62 (1990); Donald H. Regan, *Authority and Value: Reflections on Raz's "Morality of Freedom"*, 62 S. CAL. L. REV. 995, 1056-75 (1989); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 795-808 (1994). In the specific context of negligence law, John Fleming has argued that the problem of incommensurability helps explain what he sees as the peripheral status of cost-benefit analysis. JOHN G. FLEMING, *THE LAW OF TORTS* 109 (7th ed. 1987) ("[N]on-economic values, like health and life, freedom and privacy . . . defy comparison with competing economic values."). I shall not address these issues here, though they are obviously relevant to the ultimate coherence of cost-benefit analysis in negligence law.

that in order to efficiently deter the tort system must award general damages.<sup>52</sup> Otherwise, defendants will underinvest in safety and/or over engage in dangerous conduct.<sup>53</sup> But if it is impossible to consistently measure some harm in dollars because the two are incommensurable then it is hard (impossible) to see how the tort system, via the Hand formula, can ever be efficient.

*Are general damages really incommensurable?* To borrow a phrase from the litigator, "money is all we have" to compensate the tort victim for his or her non-pecuniary injuries. To explain, it is impossible to make the victim whole or to do unto the suffering endured, however, money is at least some expression of society's recognition of the victim's suffering. Indeed, if factfinders do award general damage awards as a second best solution to the problem of incommensurability then why at some point don't we develop a sort of surrogate market in the value of harm? I think the answer is that we do. Quantum studies and past experience allow lawyers to bargain over the value of harm when they try to settle cases. The value of economic or special damages incurred often plays a part in the guesstimation of the value of non-economic harm suffered. Moreover, the power of the court to order additur and remittitur<sup>54</sup> as well as the power to enter a JNOV on quantum<sup>55</sup> serve to somewhat normalize awards. These facts suggest harm and dollars are not truly incommensurable, thereby lending credence to the possibility of employing the Hand formula, at least as a factor in the determination of reasonable care.

However, simply because people have developed an ability to value non-pecuniary harm in dollars, is that what we, as a society, want? Do dollars represent all that we mean by an award of those dollars for pain, suffering, or mental anguish? Or does the award, as the final decision in the case, represent the decision maker's final resolution of the various specific versions of the event it has heard? In this vein, one might conclude the final dollar award is the best the decision maker can do with a bad situation. It has been told to resolve the matter and it has done so. The award is not then purely the "value" of the suffering endured but rather part of the sum total of the decision maker's resolution of the dispute in an imperfect world. In a way, the award is like the intuitive decision to wear blue, rather than red, next Thursday.

Although I will talk about the subject of compensatory damages in more detail in a subsequent section, a mythological reference may shed some light on the present discussion of incommensurability. After the character God<sup>56</sup>

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<sup>52</sup> See Posner, *supra* note 49.

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., Laycock, *supra* note 21, at 187-89.

<sup>55</sup> FED. R. CIV. P. 50.

<sup>56</sup> Please note that I am not preaching here. God is the character's name in the story.

put Job through the ringer, killing Job's wife and children, destroying Job's crops, and then some, God tried to make it up to Job. But, in restoring Job, God, the supposedly omniscient all powerful being that He<sup>57</sup> is in the story, does not undo what He has done. Instead, God gives Job *new* crops and a *new* wife and *new* children. Let me ask those readers who have a significant other (or others) whether the loss of that person or persons and their subsequent replacement with a new version is really the same thing as the old. I have to believe the new and the old are incommensurable. Likewise, if one loses a child and then has that child "replaced" with another, does the parent feel whole in the sense of being in exactly the position he or she would have been in if the first child had not been lost? Perhaps awarding damages for suffering and anguish is like Zorba howling at the moon.<sup>58</sup> There is no apparent point to it. It will not change anything; however, it is a metaphoric way to express outrage or sorrow or compassion. It is one way to at least try to do something about it all. Of course, if harm and dollars really are incommensurable, one might reasonably suggest that awarding damages for suffering may not be the only or even the best remedy a society could provide. Professor Leslie Bender has made some interesting suggestions on this point, postulating an obligation of caregiving in specie might be preferable to damages.<sup>59</sup> Professor Bender has also raised some critical issues about the reasonable person standard itself, to which I will now turn.

In *A Lawyer's Primer on Feminist Theory and Tort*,<sup>60</sup> Professor Bender criticizes the reasonable person standard on several fronts. First, she notes "reasonable person" is simply a politically correct editorial revision of "reasonable man."<sup>61</sup> Thereafter, Bender points out that even if the standard is now the "reasonable person" and not the "reasonable man" standard, it was still developed for and by men.<sup>62</sup> She argues the standard fails to adopt the perspective of one-half the world's population. She writes: "[n]ot only does 'reasonable person' still mean 'reasonable man' — 'reason' and 'reasonableness' are gendered concepts as well. Gender distinctions have often been

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<sup>57</sup> See C. JUNG, *Answer to Job*, in THE VIKING PORTABLE LIBRARY JUNG 519 (J. Campbell ed. 1976).

<sup>58</sup> NIKOS KAZANTZAKIS, *ZORBA THE GREEK* 59 (Carl Wildman trans. 1952).

<sup>59</sup> Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L. J. 848 (1990).

<sup>60</sup> Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. OF LEG. ED. 3 (1988).

<sup>61</sup> Anticipating one response, Bender notes that "man" is neither generic, gender neutral, nor inoffensive when used to refer to both males and females. *Id.* at 22.

<sup>62</sup> *Id.* at 22-23.

reinforced by dualistic attributions of reason and rationality to men, emotion and intuition (or instinct) to women.”<sup>63</sup>

Certainly, if the reasonable person standard denies to women the ability to reason at all it is psychologically incorrect and innately discriminatory. We all “reason.” Additionally, despite its roots in the concept of reason, I believe that the word “reasonable,” when used as an adjective in the reasonable person standard, means much more than simply the ability to reason. Instead, I think, it now implies what we expect people to do under various circumstances. It implies we expect them to act in a reasonable manner, not a manner characterized by the process of reasoning but more or less that we expect them to act like a normal person would act under the same or similar circumstances. Thus when we say that someone should act reasonably we are not ordering them to undertake some rational, Aristotelian thought process but rather we are asking them to behave the way an ordinary, normal (anonymous) being with human characteristics would behave under the same circumstances. Thus the word reasonable in the reasonable person standard is a whole lot bigger than merely one who acts by reasoning. It implies notions of community norms, both in regards to investments in safety and, I believe, in regards to compassionate behavior toward one’s coinhabitants on the planet. Consequently, while I understand Professor Bender’s objection to the word “reasonable,” I do not share her pessimism about the standard’s ability to incorporate precisely some of the perspectives she would like factfinders to more directly bring to bear on the negligence question.<sup>64</sup>

Professor Bender would jettison the reasonable person standard of care. She writes: “If we are wedded to the idea of an objective measure, would it not be better to measure the conduct of a tortfeasor by the care that would be taken by a ‘neighbor’ or ‘social acquaintance’ or ‘responsible person with conscious care and concern for another’s safety’?”<sup>65</sup> I do not object to consideration of those factors when deciding just how careful someone ought to be. I would welcome it. Nor would I object to instructing a jury concerning those “values.” My simple point is that the reasonable person standard does not, as it is now used, expressly prohibit the jury from considering just those types of factors when deciding how the parties before it should have acted in the particular case. My point is that the reasonable person standard is flexible enough to allow the factfinder in a particular case to be swayed by the compassionate values or perspectives that Bender argues ought to apply in every case.

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<sup>63</sup> *Id.* at 23.

<sup>64</sup> I freely admit that my gender may be one of the reasons I am more forgiving of the reasonable person standard than Professor Bender. Inevitably, while I may try to understand it, I cannot truly share her perspective.

<sup>65</sup> Bender, *supra* note 60, at 25.

Interestingly then, Bender is concerned because the reasonable person standard overrates "reason" or "rationality," gender loaded terms, and underestimates a more compassionate, empathic view of accident law. Alternatively, Professor Gilles<sup>66</sup> is concerned because the reasonable person standard may not adequately inform factfinders about the role efficiency plays in defining negligence. It is for that reason he would endorse "Hand Formula" instructions to juries in negligence cases.<sup>67</sup> Thus, Professors Gilles and Bender object to the reasonable person standard for different philosophical reasons, but for the same functional reason. The standard does not particularly focus in on the values they see as most significant. It is for precisely that reason that I applaud the standard and its vague generality. It allows all the values that a compassionate society might want to consider in the determination of negligence to vie for a lead role in the particular case before the court. It allows the relevant decision maker to look at the detail of the particular case long and hard before falling upon the most relevant policies or emotions. Indeed we might conclude that in many cases it is not the particular policies of tort law that determine the outcome of the case but rather it is what the particular decision maker deems the fairest outcome.

The "reasonable person" standard provides the decision maker with a standard in the nature of metaphor. It allows consideration of many different factors without forcing a logically oriented, hierarchical explanation of why one factor or another is or ought to be preeminent. It allows for the unexplained conclusion that may be at the heart of many difficult decisions. However, the standard also allows consideration of logical arguments and efficiency concerns. Like any stew (or story), the standard allows the various ingredients to simmer and mingle, effecting one another and the ultimate product as they might.

Before leaving the reasonable person, however, let me tarry for one more moment over the standard and Gilles' and Bender's views thereof. Interestingly, Bender calls for a more compassionate articulation of the standard of care. Gilles calls for a more efficiency oriented articulation of the standard. However, Professor Gilles is not unconcerned with the costliness of self-interest in an efficiency oriented world. He solves the problem by using the "single owner" version of the reasonable person standard.<sup>68</sup> Gilles says:

The device that enables the Hand Formula to rule while remaining invisible is a modified reasonable person heuristic. The standard described above calls for comparison between the value the average

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<sup>66</sup> See Gilles, *supra* note 36.

<sup>67</sup> *Id.* at 1054.

<sup>68</sup> See Richard Epstein, *Holdout, Externalities, and the Single Owner: One more Salute to Ronald Coase*, 36 J. L. & Econ. 553 (1993).

injurer would assign to precaution costs and the value the average victim would assign to the expected accident costs eliminated by the precaution. Because the average injurer and the average victim, taken together, constitute the average person, the inquiry reduces to whether the average person would take the precaution if he or she bore both the costs and benefits in full. We might call this heuristic, in which the potential victim and the defendant are the same person, the "single owner" version of the reasonable person standard.<sup>69</sup>

The single owner version of the standard takes care of the economic problem of externalities. An actor will take account of the costs its activities imposes upon others because, under the standard, those costs are treated as if they were costs the activity imposed upon the actor herself.

However, if we examine the single owner version of the standard from outside the legal, economical context in which Gilles uses the term we notice something rather remarkable. The single owner heuristic, while still focusing on costs and benefits is a sort of economic Golden Rule. It says: economically speaking, treat your neighbor as you would treat yourself. Only impose those costs on someone else that you would impose upon yourself. The single owner heuristic provides that an actor must value the costs its action imposes upon another the same as it would value those same burdens if imposed upon itself. While Professor Bender might still object to the emphasis on costs and benefits, the single owner heuristic carries within itself the capacity to contemplate economically compassionate behavior. Moreover, for present purposes, the single owner heuristic allows the decision maker to consider the case from both the plaintiff's perspective and the defendant's perspective. In an ironic twist, the single owner heuristic collapses the difference between the plaintiff and the defendant. As such, it encourages the decision maker, at least the economic decision maker, to bridge the gap that separates the plaintiff and the defendant, i.e., to analyze the case finally as if one person caused the injury to herself and then to ask if such personal injury (literally) would be efficient. Another way to ask the question is to ask whether the imposition of the injury upon one's self would be tolerable.<sup>70</sup> The single owner heuristic bridges the gap of separateness that would otherwise exist between plaintiff and defendant.

By way of summary, the reasonable person standard manifests the flexibility inherent in negligence "law." It allows the jury, whether infused with economic principles or not, to make fact specific determinations concern-

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<sup>69</sup> Gilles, *supra* note 36, at 1035.

<sup>70</sup> The reader will note that the single owner heuristic shatters the common law's distinction between misfeasance and nonfeasance. Professor Bender would also ignore that traditional distinction. Bender, *supra* note 60, at 33-36.

ing what is or what is not reasonable care under the circumstances. As such, the reasonable person standard allows negligence law to blossom and respond to both differing situations and to the compelling concerns of the community. Moreover, the reasonable person standard allows the jury to bring its common sense compassion to bear upon the facts of the particular case. While some may perceive the standard's vague open-endedness as a deficit, rather than a strength, it remains that the reasonable person standard is one of the reasons why negligence, as we know it, defies the precise articulation we see, or think we see, in some other areas of the law. However, the reasonable person standard is not the only place where the flexibility inherent in negligence and tort manifests itself. Proximate cause and duty/risk, have, over the years, been almost as defiant as the reasonable person standard in their steadfast refusal to be reduced to a series of succinct rules.

### III. PROXIMATE CAUSE AND DUTY/RISK: FLEXIBLE POLICY MAKING

Perhaps no area of law plagues the logical powers of law students and lawyers more than proximate cause in negligence cases. One of proximate cause's most perplexing points is its overlap with or relationship to the duty element of negligence, supposedly a separate element. Doctrinally, duty and proximate cause are kept separate in the traditional approach to negligence. That is, the defendant must have a duty toward the plaintiff not to engage in the particular conduct involved *and* the defendant's breach of that duty must be the proximate (or legal) cause of the plaintiff's injuries.<sup>71</sup> However, one of the great breakthroughs of legal scholarship in the earlier twentieth century, spearheaded by Dean Leon Green and Professor Wex Malone, was that duty and proximate cause were, in essence, two aspects of the same basic question.<sup>72</sup> We might call that basic question the duty/risk question.<sup>73</sup> That basic question in a negligence case is whether this plaintiff should recover from this defendant for these injuries which arose in this manner.<sup>74</sup> To answer that question Green and Malone collapsed the duty and proximate cause questions into one basic inquiry: did the defendant owe a duty to this plaintiff to protect against this risk which arose in this manner in this case? In collapsing those elements, duty/risk expressly recognizes the authority of the court, in a particular case, to articulate the scope of the relevant duty. Green

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<sup>71</sup> KEETON, ET AL., *supra* note 14, § 30 at 164-68.

<sup>72</sup> See generally, LEON GREEN, THE RATIONALE OF PROXIMATE CAUSE 39-40, 76-77 (1927); Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 73 (1956).

<sup>73</sup> See Galligan, *supra* note 15, at 36.

<sup>74</sup> See, e.g., Galligan, *supra* note 15; Galligan, *supra* note 48, at 1509; William R. Crowe, *Anatomy of a Tort*, 22 Loy. L. Rev. 903 (1976).

emphasized that the court answered the duty/risk question as a matter of law.<sup>75</sup> It was a question for the court, not for the jury.<sup>76</sup> The paradigm opinion applying the duty/risk method of analysis is Justice Cardozo's opinion for a majority of the court in *Palsgraf v. Long Island Railroad*.<sup>77</sup> In *Palsgraf*, Cardozo held that the Long Island Railroad owed no duty to Helen Palsgraf to protect her from the risk of being hit in the head by falling scales which toppled when railroad employees pushed a boarding passenger from behind causing him to drop a bundle containing fireworks which ignited and, in turn, caused the scales to fall on Mrs. Palsgraf's head.

The duty/risk method of analysis expressly recognized and articulated the judges' supposed *law* making power in a negligence action. As such, it revealed to judges, lawyers, and legal scholars that the issue of proximate cause, under the traditional approach, was really a question of policy. Proximate cause was really a question of whether *this* plaintiff ought to recover from *this* defendant in *this* particular case as a matter of policy. Thus, the word "cause" in proximate cause is a metaphor for a societal balancing process. Cause, in proximate cause, is not related to philosophical conceptions of cause at all. Instead, it relates to a socially specific decision regarding the liability of the particular defendant before the court to the particular plaintiff before the court for the particular injuries before the court. Thus, as the first year law students sees, usually on the eve of his or her torts final, proximate cause is really a policy question, not a cause question at all. Despite the persuasive force of the works of Green, Malone, and their followers, many jurisdictions still adhere to the traditional approach to negligence, leaving the policy loaded question of proximate cause to the jury. Perhaps this is inevitable; perhaps it is even desirable. My goal here is not to proselytize on behalf of one approach or the other. My goal here is to examine both approaches and to reveal how *each* in practice is consistent with my storytelling model of torts. I aim to show how each approach is so general and responsive to the details of the case that either approach yields a fact-specific, detail responsive, non-prescriptive result. Let me begin with proximate cause.

Under the traditional negligence approach, proximate cause is a question for the jury. The judge instructs the jury that in order to hold the defendant liable it must find that the defendant breached the appropriate standard of care of the reasonable person under the circumstances (what I discussed above) and that the defendant's breach of that standard was a cause-in-fact and a proximate (or legal) cause of the plaintiff's injuries.<sup>78</sup> The court instructs the

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<sup>75</sup> Green, *supra* note 72, at 4.

<sup>76</sup> *Id.*

<sup>77</sup> 248 N.Y. 339, 162 N.E. 99 (1928).

<sup>78</sup> Some courts jumble cause-in-fact and proximate cause together. Herein I focus on the



jury that a proximate cause is a cause which, "in a natural and continuous sequence, produces damage. . ."<sup>79</sup> Or, the judge tells the jury that one proximately causes those damages which directly result from his or her negligent conduct, or, a judge might tell the jury that one proximately causes those damages which might foreseeably arise from his or her conduct.<sup>80</sup> What the judge means by foresight depends upon his or her lexicon of legal terms. Some courts use the term foresight to truly mean foresight, i.e. what was foreseeable beforehand.<sup>81</sup> Other courts, and even the Restatement (Second), use the term, at least under certain circumstances, to mean hindsight.<sup>82</sup> Moreover, it is at the proximate cause stage that the jury must decide whether or not any number of possible intervening causes rise to the level of superseding causes.<sup>83</sup> If an intervening cause rises to the level of a superseding cause then the original defendant is relieved of liability.<sup>84</sup> Concomitantly, if the intervening cause does not supersede then the intervening cause does not break the metaphorical chain of causation and the jury is still free to find the defendant's conduct was a proximate cause of the plaintiff's injuries.<sup>85</sup>

In short, the "law" of proximate cause, given to the jury in the form of a jury instruction, is comical. There is, in essence, little or no, guidance at all. The jury is given a broad range of buzz words which have little or no real predictive power at all. The jury is asked to decide, in light of those buzz words, whether the defendant ought to be held responsible for the plaintiff's injuries. The jury is really asked to decide the policy issue at the heart of the particular case before it in light of a series of words which have virtually no logical, determinative effect. One who takes doctrine seriously is tempted to throw up his or her hands at this point and simply walk away from negligence law altogether. The more optimistic among us who recall Green and Malone's teachings that proximate cause is largely a question of policy may still end up shaking our heads in disbelief when a jury is asked to decide such important matters of policy.

Whatever prescription one may come up with for a legal system so devoid of rules, the point is that the jury, when deciding the proximate or legal

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proximate cause element, *not* cause-in-fact.

<sup>79</sup> ARKANSAS MODEL JURY INSTRUCTIONS, AMI 501 (1974).

<sup>80</sup> TEXAS PATTERN JURY CHARGE, § 203.

<sup>81</sup> See, e.g., *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151 (La. 1988); *Overseas Tankship (U.K.) L. v. B. Mort's Dock & Eng'g Co., L.* (Wagonmound N.O. 1), [Privy 1961] A.C. 388 (Privy Counsel).

<sup>82</sup> See, e.g., *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, (1928) (Andrews J., dissenting); RESTATEMENT (2D) OF TORTS § 443, cmt. b (1965).

<sup>83</sup> See KEETON ET AL., *supra* note 14, § 44 at 301-19.

<sup>84</sup> *Id.* at 303.

<sup>85</sup> *Id.* at 301.

cause issue, is free to apply its sense of justice to the particular case before it. By entrusting the jury with the power to set the limits of the defendant's duty in the particular case as a matter of fact/law the court is essentially abdicating its decisionmaking power in the particular case. In this vein, the law of proximate cause is not dissimilar from the standard of care that I have discussed above. The standard of care is sufficiently vague and general to allow the jury to determine negligence cases on a case-by-case basis. It is general enough to allow the jury to make decisions regarding the appropriate standard of care in light of their sense of fairness or justice. It is broad enough to allow the jury to consider the detail of the particular stories they are asked to consider and to render a decision in light of those stories.

The same is true with proximate cause. The lack of rules surrounding proximate cause, in most cases, allows the jury, or judge as factfinder, to consider the case in light of the particular details of the narratives presented to it by the respective parties and ultimately to render a proximate cause decision in light of how those detailed stories strike them. That is, in most garden variety tort cases, where the factfinder decides proximate cause, the detail of the facts of the particular case, rather than some more generally applicable legal rule, becomes the focus of the jury's application of its sense of justice to the case before it.

Thus, in jurisdictions where juries, or judges, as factfinders, decide proximate cause as a mixed question of law and fact they are relatively unconstrained by doctrine in deciding the particular cases before them. Likewise, the parties are free to present their versions (stories) within a broad spectrum of dramatic possibility. The lack of rules on this critical point allows the creative lawyer room within which to work. Proximate cause is a blank easel on which to paint. Proximate cause "law" encourages the parties to present detailed, emotionally evocative productions of their view of the case.

Now, let us consider whether a jurisdiction which has adopted Green and Malone's duty/risk approach manifests a more analytical, logical pattern. As noted, the duty/risk approach collapses the duty and proximate cause into one question. That one question is whether or not the defendant's duty extends to protect the particular plaintiff from the particular risk which arose in the particular manner before the court. This question may be viewed as a question of law. Leon Green thought the duty/risk question was an issue of law for the court to decide.<sup>86</sup> In deciding this legal issue the court supposedly considers the case in light of the relevant policies of tort law such as deterrence, compensation, risk spreading, punishment, administrative convenience, consistency with prior decisions and legislative enactments, and morality, i.e.

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<sup>86</sup> See GREEN, *supra* note 72, at 4.

the community's sense of fairness or justice.<sup>87</sup> One of the supposed benefits of the duty/risk approach is its evocation of a judicial discussion of the particular case in light of the relevant policies of tort law. Several points bear emphasis here: (1) the specificity with which the court asks the duty/risk question and the effect of that specificity on the development of doctrine and tort law, (2) the courts' persistent failure to express the analysis the duty/risk method supposedly evokes, and, finally, (3) the inevitable slippage, even in a duty/risk jurisdiction, back towards a proximate cause approach.

Let me begin with specificity. According to Green, the duty/risk question was a question of law for the court to answer before it submitted the issue of the defendant's compliance or non-compliance with the standard of care to the jury.<sup>88</sup> The court had the power, in any case, to ask the duty/risk question in an extremely fact specific manner. One of the most off-cited of all duty/risk cases is the Louisiana Supreme Court's 1972 opinion in *Hill v. Lundin & Associates*.<sup>89</sup> *Hill* is a case specific application of the duty/risk method.

After Hurricane Betsy, New Orleans was in shambles and home owners began the repair effort. Lundin & Associates, Inc. was a contractor engaged in the campaign to repair the city. Mrs. Rosemary Delouise had suffered damage to her home in the hurricane and she hired Lundin to do repair work. Lundin apparently had quite a few jobs going on at the time. In order to operate efficiently, given the need to get repairs done quickly to avoid further damage and the shortage of labor and materials, Lundin delivered both material and equipment to each job site by truck. Later, repair people arrived, did the work, and left. Thereafter still, workers would come and pick up the equipment and left over materials. Presumably this process freed up the repair persons to get on to their next job without having to worry about "clean up." Lundin's operation was a veritable assembly line of residential repair with each link in the chain doing its job and its job only.

In any event, after repairing the Delouise home, Lundin's people left a metal ladder on the job site, a ladder leaning up against the Delouise home. Later, some unknown person took the ladder down from the house and laid it in the yard. Thereafter, the phantom ladder mover walked back into the fog of post-hurricane New Orleans, never to be heard from again.

A few days after the construction work, Mrs. Delouise's employee, Mrs. Hill, went out to the yard to hang up some wash. The ladder was lying in the yard when Mrs. Hill went to hang up the laundry. Mrs. Hill knew the ladder was there; indeed she stepped over the ladder to get to the clothes line. While Hill was in the yard, her charge, the youngest Delouise child, about 2 or 3

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<sup>87</sup> Crow, *supra* note 74.

<sup>88</sup> Green, *supra* note 72, at 4.

<sup>89</sup> 256 So. 2d 620 (La. 1972).

years old at the time, came running out, looking for Mrs. Hill. When Hill heard the back door slam, she looked up to see the youngster running toward her. Instinctively, Hill hurried in the child's direction to prevent him from falling over the ladder. Alas, the trap from which Mrs. Hill sought to save the child proved to be her own downfall — literally. Hill fell over the ladder herself and suffered injuries in the process: an incisional hernia and an acute lumbosacral strain.<sup>90</sup>

Most critically for present purposes, Mrs. Hill sued Lundin, claiming it had been negligent to leave the ladder leaning up against the side of the house. Somehow or other this garden variety tort case made it all the way to the Louisiana Supreme Court. The case is of critical importance both in the development of Louisiana negligence law and in the national history of the duty/risk approach because it is one of the first cases in which a state's high court *expressly* employed the duty/risk negligence approach in a plain old tort case (one not involving the violation of a criminal statute).<sup>91</sup> Moreover, Hill is one of the most pristine examples of a high court's use of the duty/risk analysis to decide a negligence case. In an opinion by Justice Barham, the Louisiana Supreme Court first briefly described the duty/risk method of analysis. The court noted:

It is only that conduct which creates an appreciable range of risks for causing harm that is prohibited. Leaving a ladder unattended under certain circumstances may create an unreasonable risk of harm to others which would impose a reciprocal duty upon the actor. If we assume that the defendant was under a duty not to leave the ladder leaning against the house because of an unreasonable risk of harm, the breach of that duty would not necessarily give rise to liability in this case.<sup>92</sup>

Thus, the court said that even if leaving a ladder up against the side of the house may be careless (negligent) it would not necessarily protect every claimant from every risk which may transpire as a result of the ladder being left up against the side of the house. The court then asked the basic duty/risk question in light of the particular facts of the case, devoid of any reference to proximate cause buzz words like direct, intervening, or superseding:

The basic question then, is whether the risk of injury from a ladder laying on the ground, produced by a combination of the defendant's

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<sup>90</sup> I have essentially quoted the facts from one of my previous works. Galligan, *supra* note 15, at 32-33.

<sup>91</sup> *Id.* at 1.

<sup>92</sup> 256 So. 2d at 622.

act and that of a third party, is within the scope of protection of a rule of law which would prohibit leaving a ladder leaning against the house.<sup>93</sup>

Then, after various general statements, the court answered its own duty/risk question stating:

A rule of law which would impose a duty upon one not to leave a ladder standing against a house does not encompass the risk here encountered. We are of the opinion that the defendant is under no duty to protect this plaintiff from the risk which gave rise to her injuries. The plaintiff has failed to establish legal and actionable negligence on the part of the defendant.<sup>94</sup>

Consequently, the court concluded the defendant's duty (if there was one) not to leave the ladder leaning up against the side of the house did not include the risk that Mrs. Hill would be injured when she fell over the ladder because some third person moved it. As such, due to its conclusion of law in answering the duty/risk question, there was no issue of the appropriate standard of care to be decided by the trier of fact.<sup>95</sup>

The specificity with which the court asked the duty/risk question in *Hill* resulted in a legal decision that the particular defendant's (Lundin) duty did not include the risk that the particular plaintiff (Hill) would be injured in the particular manner in which she was injured. The decision resulted in a fact specific no duty rule. The fact specific no duty rule must be contrasted with more general no duty rules such as the economic harm rule,<sup>96</sup> the general no duty to act rule,<sup>97</sup> the traditional rule that one may not recover for negligently inflicted emotional distress,<sup>98</sup> and more<sup>99</sup> which will be discussed below. In *Hill*, we have a no duty rule based upon the particular facts of the case. Note that the factfinder played no role in deciding the scope of that duty (i.e. proximate cause). The court decided the scope of the duty as a matter of law. But is the fact specific no duty rule really so different than a fact specific decision by a jury (or judge as factfinder) that Lundin did not proximately or

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 623.

<sup>95</sup> In fact, *Hill* was a bench trial so if the court had decided the defendant had a duty not to leave a ladder lying against a house and that that duty included the risk which occurred in the case it would have had to decide the question of breach.

<sup>96</sup> LAYCOCK, *supra* note 21, at 116-18.

<sup>97</sup> See KEETON ET AL., *supra* note 14, § 56 at 373-75.

<sup>98</sup> *Id.* at § 54.

<sup>99</sup> See *infra* Section V.

legally cause the plaintiff's injuries? I would argue it is not. Consider, just how many cases there are which a lower court will be able to decide as a matter of law based on the rule of law articulated in *Hill*? I think the answer is none. The specificity with which the court decided the duty issue effectively precluded its use as a future predictive tool. There will not be other cases exactly like *Hill*. In deciding the scope of the duty in future cases a court employing the law-stating power which the duty/risk approach gives it will have to issue a *new* case specific rule. In essence then, the case specific application of the duty/risk approach does nothing to the traditional proximate cause approach except to transfer decision making power to the judge.

The proximate cause approach results in case specific, policy decisions concerning the scope of duty (or liability) too but with proximate cause the factfinder decides. The only difference between the case specific duty/risk approach and the traditional approach is who decides. Under the proximate cause approach, the factfinder decides the case in light of the particular presentations of the parties whereas under the *Hill* approach the judge decides the scope of the duty; but, that judge's decision is just as much a case specific decision as the jury's decision as proximate cause.<sup>100</sup> Moreover, both judge (duty/risk) and jury (proximate cause) are allowed to listen to the risk detailed stories the parties present. Under either duty/risk or proximate cause the parties have great flexibility in how they present their cases. Under either approach, the relevant decision maker, whether factfinder or law maker, issues a specific decision for the case with little or no precedential value. Neither decision, as the following paragraphs reveal is particularly logical. And, as such, both defy doctrine.

The second point concerning the duty/risk approach and the subject of this paper revolves around the supposedly evocative nature of the duty/risk approach. I borrow the word "evocative" from Professor David Robertson of the University of Texas.<sup>101</sup> Duty/risk supposedly evokes a discussion of the court's analysis, i.e. it evokes reasoned elaboration. However, I am struck, after reading scores of duty risk cases in Louisiana, the jurisdiction which I am most familiar, that our supposedly evocative duty/risk approach often evokes little or no actual policy discussion. I should rephrase and say that I am not sure the able Louisiana judges analyze and discuss "policy" any more often than judges deciding tort cases in other jurisdictions.

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<sup>100</sup> In essence, the judge's decision of the scope of the duty in a case like *Hill* is akin to Holmes' statement that negligence cases, over time, ought to be decided according to rules of law. See, e.g., OLIVER W. HOLMES, JR., *THE COMMON LAW*, 98-99 (Baltimore 1881). However, Holmes' rules of law related to the applicable standard of care and thus, technically, the issue of breach. Here, in a case like *Hill*, the issue related to the scope of duty or what the traditional approach calls proximate cause.

<sup>101</sup> See, David W. Robertson, *Reason v. Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Assoc., Inc.*, 34 LA. L. REV. 1 (1973).

Supposedly, as I understand duty/risk, it is designed to encourage judges to apply the particular policies of tort law to the particular cases they consider and to explain that application. Duty/risk supposedly evokes a policy discussion of the facts of the particular case being decided. But, let's look back at *Hill*.

In *Hill*, the court simply said there was little or no "ease of association"<sup>102</sup> between a rule of law which would say that one should not leave a ladder leaning up against the side of a house and the result which happened in the case.<sup>103</sup> One is struck by the number of duty/risk cases which, while alluding to policy, simply draw a conclusion that the defendant's duty either does or does not include the risk which manifested itself to the particular plaintiff in the particular case.<sup>104</sup> Robertson, while using the word "evocative," in reference to duty/risk, has, in fact, recognized the courts' persistent inability to articulate the basis, if any for their analysis (if there is any). He has stated, in reference to *Hill*:

Maybe it is just a matter of tradition. Courts do not talk that way, it is just not done. But, really, you must realize often there is not very much sensibly to be said about the ultimate reason for a particular result — that it just seems more fair than the opposite outcome may be about all there is to it.<sup>105</sup>

So, courts just do not talk about policies. Well, duty/risk is supposed to get them to talk about policy so perhaps the failure to talk about policy is a failure of duty/risk. Or, perhaps, as Robertson so aptly suggests, the results in particular cases are not driven so much by the policies of tort law, which we scholars so rationally and logically apply to broad classes of cases, but rather results in particular cases are driven by what seems fair to the particular decision maker, i.e., judge or jury. The articulation of why a particular result seems more fair than the opposite result is not possible. It is not a purely rational decision. It is as much a visceral or emotional decision as it is the result of reasoned analysis. Likewise, one's perception of fairness may vary

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<sup>102</sup> 256 So. 2d at 622.

<sup>103</sup> Louisiana courts have relied upon the phrase "ease of association" in deciding duty/risk cases since *Hill*. See, e.g., *Roberts v. Benoit*, 586 So. 2d 131 (La. 1990). The phrase is surely not a substitute for more traditional legal analysis. In fact, one might reasonably conclude ease of association is, in essence, merely another buzz word/phrase like "direct", "foreseeable", "natural", "remote."

<sup>104</sup> Happily, there are Louisiana decisions which particularly analyze the policies of tort law in light of the duty/risk approach thereby fulfilling duty/risk's promise. See, e.g., *Fowler v. Roberts*, 556 So. 2d 1 (La. 1990); *Pitre v. Opelousas General Hospital*, 530 So. 2d 1151 (La. 1988); *Turner v. NOPSI*, 476 So. 2d 800 (La. 1985) (Dennis, J., concurring).

<sup>105</sup> Robertson, *supra* note 101, at 12.

with the facts and details of the particular cases. Perhaps then, we see one of the reasons why the traditional approach to negligence hides behind the buzz words of proximate cause. It hides behind those words because those buzz words are essentially broad metaphors for fairness. The words open out to allow the factfinder to apply its perception of fairness to the facts of the particular case.

Robertson's insights lead to another useful point. Perhaps, some of the policies of tort law are susceptible to reasoned analysis and application in *real* cases. These would seem to include deterrence, risk spreading, and administrative convenience. In our modern age deterrence becomes synonymous with the economic approach to negligence law, as exemplified by the Learned Hand Formula.<sup>106</sup> One might decide judges are better trained than juries to deal with economic analysis. Moreover, risk spreading may also be an area where judges are better able to evenhandedly analyze the effects of potential results than juries which may be overinfluenced by pure redistributive concerns. Additionally, a jury may not be particularly apt at gauging the potential effects of its decision on the administration of justice. A particular jury may not be able to understand the potential for future suits of a decision holding the defendant liable to the plaintiff. That is, the jury may not be able to understand the practical difficulty of allowing recovery in a class of cases. Alternatively, where a statute is involved and a plaintiff attempts to use the statute to establish the appropriate standard of care for the particular case,<sup>107</sup> questions of legislative interpretation are involved.<sup>108</sup> Courts trained to interpret statutes would seem to have an advantage over juries here as well.

However, recognizing that courts may be more adept than juries at articulating and applying certain of the policies of tort law does not mean that a court is superior to a group of lay people in deciding what result in a particular case is the most fair. One of the basic strengths of the jury, as a decision maker, is its ability to bring the common sense of the community to bear on the facts of the particular case. One may wonder whether or not, where the determinative issue is one's gut sense of fairness, judges or juries ought to be making that decision.

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<sup>106</sup> See *United States v. Carroll Towing Co.*, 159 F. 2d 169, 173 (2d Cir. 1947).

<sup>107</sup> See KEETON, ET AL., *supra* note 14, § 36 at 220.

<sup>108</sup> In violation of statute cases, the court must decide whether or not the plaintiff is within the class of plaintiffs sought to be protected by the statute and whether or not the risk is within the class of risks which the legislature enacted the statute to guard against. See, e.g., *Stachniewicz v. Mar-Can Corp.*, 259 Or. 583, 488 P.2d 436 (1971). Facially, resolving these questions is an issue of legislative intent. However, legislative intent is often lacking and is always subject to manipulation. Thus, courts and commentators have recognized that the interpretation of legislative intent is as much a matter of judicial policy making as it is legislative policy making. See, e.g., *Hill v. Lundin & Assoc.*, 256 So. 2d 620, 621 (La. 1972).



It is precisely because juries in particular cases may be the preferred body for deciding the scope of the defendant's duty that there is an inevitable slippage even in a so called duty/risk jurisdiction back to the proximate cause approach. Some may decry the slippage; however, it seems inevitable.<sup>109</sup> It is inevitable that parties will prevail upon the judge, or the judge will independently decide, to entrust the fairness question to the jury.<sup>110</sup>

Thus, if the scope of the risk question in a particular case involves essentially a question of basic fairness one might conclude courts would like to have the power to ask the jury to make that decision. One way to get the jury to make that decision is to address a part of the scope of the duty issue to the jury. In a duty/risk jurisdiction the court could do so by either instructing the jury to make part of the duty/risk determination or it could instruct the jury to decide whether or not the plaintiff's injuries were proximately or legally caused by the defendant. In fact, the Louisiana Supreme Court has authorized such a legal cause approach in at least some cases.<sup>111</sup> Thus, in Louisiana, one duty/risk jurisdiction, there has been a slippage back to the proximate cause analysis, at least in certain cases.

Consequently, one sees that proximate cause, duty/risk, and the standard of care all allow some decision maker, whether judge or jury, to apply its broad sense of fairness to the particular facts of the particular case. Whether we are talking about a breach of the appropriate standard of care, duty/risk decided by the court, or proximate cause decided by the jury we are talking about areas where doctrine, legal rules, do not prevail. Dogma does not decide these cases. Rather, the jury or judge looks at the facts of the particular case before it and, by applying general, metaphorical, concepts to the particular facts, the relevant decision maker decides the particular case. The relevant decision maker listens to the plaintiff's story and the defendant's story and ultimately writes its own story, or at least writes its own ending to the story.

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<sup>109</sup> See, e.g., Bobby M. Harges, *The Rebirth of Proximate Cause in Louisiana: A Call for the Return to Duty Risk Analysis*, 39 Loy. L. Rev. 769 (1994).

<sup>110</sup> Revealingly, even in a case where the plaintiff asks the court to adopt a statute as the standard of care of the reasonable person there is an inevitable tendency for a jury to end up involved in deciding the scope of the duty. This can effectively happen in one of two ways. Sometimes it happens overtly because the court, even though it has decided to adopt the statute, still asks the jury to decide whether or not the violation of the statute legally causes the plaintiffs damages. In other cases, the jury effectively gets to decide the scope of the duty because the procedural effect of violation of statute is either some evidence of negligence or a rebuttable presumption of negligence thus shifting the burden to the defendant to prove it was not negligent. In these cases, the jury is free to establish its own standard of care and in doing so, in essence, to decide not only the standard of care but also the scope of the duty under the guise of applying the standard of care. Of course, the jury may do the same thing in any negligence case by effectively merging the standard of care/legal cause decision into one basic fairness question.

<sup>111</sup> *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151 (La. 1988).

The particularized, case specific, dogma defying, characteristics of negligence law manifest themselves not just in the three areas already discussed but also at the damages stage when the jury is asked to award compensatory damages and with the allocation of fault under the modern doctrine of comparative fault.

#### IV. CONTINUATION OF A COMMON THREAD: COMPENSATION AND COMPARATIVE FAULT

Compensatory damages are designed to make the plaintiff whole. The purpose of compensatory damages is to put the plaintiff in the position he or she would have been in but for the wrong. As Professor Douglas Laycock has said: the purpose of compensatory damages is to return to the plaintiff to his or her rightful position.<sup>112</sup> In tort cases compensatory damages generally include two categories: special damages and general damages. Special damages are those damages which must be specially pled<sup>113</sup> and which, hypothetically at least, are susceptible of some precise determination.<sup>114</sup> These include lost wages, both past and present, and medical expenses, both past and present.<sup>115</sup> General damages are damages awarded for incalculable injuries such as: pain and suffering, mental anguish, and possible loss of enjoyment of life.<sup>116</sup> In either case, the award of damages in the particular tort case is focused not on the class of people of which the plaintiff is a member or on the general type of injuries which the plaintiff has suffered but rather on the particular plaintiff involved.

Thus, in awarding special damages, the jury must consider the circumstances of the particular plaintiff. If the particular plaintiff has medical expenses which the reasonable plaintiff would not have incurred those expenses might be still recoverable. Moreover, in awarding lost wages or lost earning capacity, the factfinder considers the losses suffered by the particular plaintiff not the losses that the average wage earner would suffer.

One sees the same specificity when the avoidable consequences doctrine is involved. The avoidable consequences, or mitigation of damages, doctrine provides that the plaintiff, after suffering injury, must act reasonably to mitigate the affects of the injury.<sup>117</sup> However, if for some particular reason, the plaintiff reasonably cannot take certain steps to avoid damages his or her

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<sup>112</sup> LAYCOCK, *supra* note 21, at 15.

<sup>113</sup> DOBBS, *supra* note 13, § 34 at 234.

<sup>114</sup> LAYCOCK, *supra* note 21, at 60-61.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> DOBBS, *supra* note 13, § 39 at 27.

award will not necessarily be reduced.<sup>118</sup> Thus, the obese plaintiff who is not able to exercise may suffer greater damages than the thin plaintiff whose exercise regimen can mitigate the effects of his or her personal injury.<sup>119</sup> These additional damages will be recoverable. The impecunious plaintiff who cannot afford certain damage abatement measures will still be entitled to recover damages which a more financially well healed plaintiff might have been able to avoid by a relatively small investment.<sup>120</sup> Or, if the right invaded in the particular case would be eviscerated by requiring mitigation, the plaintiff may have no duty to mitigate.<sup>121</sup>

Turning to general damages, we see perhaps the most dramatic example of tailoring damage awards to the needs of the particular plaintiff. Juries rendering awards for mental anguish, pain and suffering, and loss of enjoyment of life focus not on the average person but once again, on the particular plaintiff. Unlike worker's compensation cases where the loss of a hand (the loss of a leg, the loss of an eye, etc.) has some scheduled "value," in tort cases factfinders consider the details of the particular case. Fact finders consider the pain the particular plaintiff suffered, the mental anguish this plaintiff has suffered, and the loss of enjoyment of life this plaintiff has suffered.<sup>122</sup> The jury focuses in on the particular plaintiff involved in the particular case. It should be noted that recent proposals to provide jurors with guidelines or schedules<sup>123</sup> for general damages are inconsistent with traditional rules concerning general damages. The proposals would abstract away from the particular plaintiff. While some of these proposals would *not* bind the jury to award scheduled amounts, the guidelines would inevitably tend to encourage juries to consider and perhaps to focus on the average case rather than the particular case. While this may not be an undesirable trend, it would be inconsistent with the traditional approach to general damages.

Jurisprudence involving the loss of enjoyment of life manifests a similar concern for the individual plaintiff. When the plaintiff sues for the loss of enjoyment of life she claims she does not get the same enjoyment out of life she obtained prior to the injury. However, several cases have held that comatose plaintiffs because they are unaware of their condition, are not able to recover for either pain and suffering, or for loss of enjoyment of life.<sup>124</sup>

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<sup>118</sup> *Id.* at 273.

<sup>119</sup> *Close v. State*, 456 N.Y.S. 2d 437 (App. Div. 1982).

<sup>120</sup> *Persinger v. Lucas*, 512 N.E. 2d 865 (Ind. App. 1987).

<sup>121</sup> *O'Brien v. Isaacs*, 17 Wis. 2d 261, 116 N.W. 2d 246 (1962).

<sup>122</sup> *See generally*, LAYCOCK, *supra* note 21, at 144-90.

<sup>123</sup> *See, e.g.*, THE AMERICAN LAW INSTITUTE STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, 219-220 (1990); Bovbjerg, Sloan, and Blumstein, *Valuing Life and Lemon Tort: Scheduling "Pain and Suffering"*, 83 N.W.U.L. REV. 908 (1988).

<sup>124</sup> *See, e.g.*, McDougald v. Garter, 73 N.Y. 2d 246, 536 N.E. 2d 372 (1989).

Once again, these decisions are consistent with traditional rules focusing on the particular situation of each plaintiff. They are consistent because rather than adopting a deterrence oriented perspective which would seem to sanction recovery despite lack of awareness juries are not allowed to award loss of enjoyment of life unless the particular plaintiff suffers the injury. Thus, according to these courts, since the unaware plaintiff does not suffer the injury, recovery is not warranted.

Finally, on the subject of compensatory damages one should note the Thin Skull Rule which is, in fact, a duty or proximate cause rule.<sup>125</sup> However, its most direct effect is on the recovery of damages. The Thin Skull Rule provides, consistent with all of what has been said so far in this section, that the defendant takes the plaintiff as he or she finds him or her.<sup>126</sup> Thus, the plaintiff with a Thin Skull is entitled to recover all damages he or she suffers, not just those damages which the defendant's misconduct would have caused the average reasonable person.<sup>127</sup> This allows full compensation for the Thin Skull plaintiff. The rule requires the jury to focus in on the precise details, both physical<sup>128</sup> and mental<sup>129</sup> of the particular plaintiff before the court. It forces the jury to consider the injury of the particular Thin Skull plaintiff.

All of these plaintiff specific damage<sup>130</sup> rules require a personalized, detailed consideration of the particular plaintiff's plight. They rely on the factfinder's response to the individualized plight for content. Rules recede from view, while detail occupies center stage.

A further indication of tort's tendency to focus on the details of the particular case manifests itself in the modern doctrine of comparative fault. Formerly, in most jurisdictions, the plaintiff's contributory negligence was a bar to recovery. A plaintiff, even if injured, would not recover compensatory damages if the defendant established that the plaintiff was contributorily negligent.<sup>131</sup> In most cases, once the courts found the plaintiff was negligent,

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<sup>125</sup> See KEETON ET AL., *supra* note 14, § 43 at 291-92.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* See also, *Steinhouser v. Hartz Corp.*, 421 F.2d 1169 (2d Cir. 1970).

<sup>130</sup> While I have limited my discussion here to compensatory damages, one could also view punitive awards as case specific punishment. As recent debate on the subject reveals, standards governing the availability and amount of punitive awards are typical of other tort standards in their generality.

<sup>131</sup> Of course, there were exceptions such as the doctrine of last clear chance. See, e.g., *Davies v. Mann*, 152 Eng. Rep. 588 (1842). Likewise, courts in several states held that in certain circumstances the defendant's duty included the risk of the plaintiff's own negligence. Thus, the defendant essentially had a duty to protect the plaintiff from his or her own negligence and the contributorily negligent plaintiff recovered despite his or her fault. See, e.g., *Boyer v. Johnson*, 360 So. 2d 1164 (La. 1979). Additionally, courts facing sympathetic

the result was no recovery.<sup>132</sup> Thus, a finding of plaintiff fault<sup>133</sup> short-circuited the need for a case specific comparison of the fault of the defendant and the fault of the plaintiff. With the advent of comparative fault that specific comparison must now be made in most cases where both parties are at fault.<sup>134</sup>

Now, when both the plaintiff and defendant are negligent the factfinder attributes fault to the plaintiff and to the defendant and then, in a pure comparative fault regime, the plaintiff recovers its damages, reduced by his or her own percentage of fault.<sup>135</sup> Even in a jurisdiction with a modified comparative fault regime, the court must quantify the respective fault of the plaintiff and defendant to determine whether plaintiff's recovery will be reduced or barred (if plaintiff's fault is greater than some specified percentage).<sup>136</sup> In essence, comparative fault allows the factfinder to consider the detailed allegations of fault against both parties and to compare the respective fault of the parties on a case specific basis to arrive at a decision which is reasonable, be it 50/50, 80/20, 73/27, or 19/81. In short, comparative fault allows the jury to divide responsibility in the particular case amongst the parties in *any* reasonable manner. The only limit the law imposes is that the allocated portions of fault total 100%.

The Uniform Comparative Fault Act counsels that, in allocating fault, a factfinder should consider (1) the causal relationship between the respective actors' conduct and the plaintiff's injuries and (2) various factors relating to the blameworthiness of the respective parties.<sup>137</sup> Essentially, the factfinder deciding a comparative fault case, like the factfinder setting the appropriate standard of care and the factfinder deciding the proximate cause, follows only the roughest of doctrinal outlines in rendering its case specific decision. The same is true of the parties as they prepare their cases.

To reiterate, the parties in a negligence action argue their cases in concrete, fact specific detail. Broad standards provide decision makers with unparalleled flexibility in rendering decisions in particular cases, when confronted with at least two detailed, personally poignant versions of the facts giving rise to the law suit. The trial becomes a societal drama where the

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plaintiffs developed special rules concerning the standard of care for certain plaintiffs, such as the physically challenged and children. These specific standards of care are now frequently applicable in cases where a relevant actor is either the plaintiff or defendant. KEETON, ET AL., *supra* note 4, § 32 at 175-82.

<sup>132</sup> Cf. note 130 *supra*.

<sup>133</sup> Even then there was a case specific, detailed consideration of plaintiff's fault.

<sup>134</sup> See generally VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (1974).

<sup>135</sup> See, e.g., KEETON ET AL., *supra* note 14, § 67 at 471 n. 28 and 472 n. 31.

<sup>136</sup> *Id.* at 473-74.

<sup>137</sup> UNIFORM COMPARATIVE FAULT ACT § 2.

decision makers play the part of both audience and adjudicator. The breadth of the relevant grounds for decision makes tort litigation both relatively unpredictable and particularly responsive to the broad range of personal injury plots produced by our technological society.

However, I would not be presenting an accurate picture of the universe of personal injury litigation if I pretended there were no rules at all. There are, in fact, constellations of cases which have clustered around what the lawyer regards as a traditional rule. I will deal with some of these legal rules, both past and present, in the next section.

#### V. TORT RULES: CENSORING THE DRAMA OF PERSONAL INJURY LITIGATION

As I noted in the last paragraph lest I leave the reader with the impression that all tort cases are decided without the benefit of any rules at all, in this section I pause to note and discuss some actual rules. Traditionally, most of these rules are broad rules preventing recovery. Put differently, they are what Professor David Leonard has calls "per se no duty rules."<sup>138</sup> Traditionally, courts recognized broad categories of cases where, despite the foreseeability of injury arising from the defendant's conduct, despite the defendants unreasonable conduct, and despite the plaintiff's actual injury as a result of the defendant's conduct, plaintiffs were not allowed to recover from defendants. Many of us recognize these cases under the rubric of Prosser, Wade & Schwartz's "Limited Duty" Rules.<sup>139</sup> For instance, traditionally a plaintiff who suffered only emotional distress could not recovery in negligence from the defendant.<sup>140</sup> The courts worried that allowing recovery would: (1) lead to fraudulent claims and (2) open the flood gates of litigation to a whole class of claims (3) which courts were not particularly well suited to resolve because no one could ever be sure what really caused the plaintiffs emotional distress, either the defendant's misconduct or some pre-existing condition. Consequently, rather than consider the details of the particular case, the court refused recovery by raising the level of abstraction and denying a class (rather than an individual) recovery. Interestingly, however, if there was some impact with the plaintiff's person,<sup>141</sup> or if the plaintiff manifested some physical injury<sup>142</sup> recovery for emotional distress was allowed. Other courts allowed

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<sup>138</sup> D. Leonard, *The Good Samaritan Rule as a Procedural Control Device: Is it Worth Saving?*, 19 U.C. DAVIS L. REV. 807, 829 (1986).

<sup>139</sup> See W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS*, Ch. VIII at 390 (8th ed. 1988).

<sup>140</sup> KEETON ET AL., *supra* note 14, § 54 at 59-67.

<sup>141</sup> *Id.* at 363.

<sup>142</sup> *Id.* at 362-64.

the case to proceed if the plaintiff was in the "zone of danger."<sup>143</sup> Thus, impact, physical manifestation, physical injury, and/or presence in the danger zone triggered a duty, thereby allowing the parties to tell their stories.

Another per se no duty rule provided that a defendant who caused purely economic loss was not liable in negligence to the plaintiff.<sup>144</sup> Here tort law deferred to contract law, coupled with a concern for opening the flood gates of litigation. However, if the plaintiff suffered *any* property damage or any personal injury economic loss would also be recoverable.<sup>145</sup> Thus, again a duty trigger (some "real" injury) allowed the parties to tell their peculiar narrative tales.

The common law also refused to allow a remote party to recover in negligence for personal injury from a manufacturer, or repair person, with whom it had no privity of contract.<sup>146</sup> Here courts slowly developed duty triggers involving dangerous products<sup>147</sup> before they shattered the "citadel" of privity<sup>148</sup> and the detailed narratives of American product liability were born.

The common law still provides that unless there is a special relationship, or the assumption of a duty, or the defendant causes the plaintiff's injury,<sup>149</sup> then there is no duty to aid another.<sup>150</sup> This rule stems from various philosophical notions of causation as well as a desire to preserve one's liberty *not* to help another.<sup>151</sup> However, in this area multiple duty triggers have developed, to the point where the rule itself lacks practical content.<sup>152</sup> As noted, once a duty is triggered the general no recovery rule barring an entire class of plaintiffs gives way and the particular plaintiff is allowed to tell her story.

Finally, for present purposes, traditional law did not recognize any right, either in the parents or in an unborn child to recover injuries caused to the unborn child.<sup>153</sup> These rules were based on problems regarding the cause of the child's condition or injury as well as intractable problems in valuing life

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<sup>143</sup> See *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2410-11 (1994) (FELA case).

<sup>144</sup> LAYCOCK, *supra* note 21, at 116-18.

<sup>145</sup> See, e.g., *Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008, 1111-12 (E.D. La. 1993).

<sup>146</sup> *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

<sup>147</sup> See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>148</sup> William L. Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099 (1960).

<sup>149</sup> See Thomas C. Galligan, *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. MICH. J. L. REFORM, 439, 449-60 (1994).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 511-130.

<sup>152</sup> *Id.* at 449-60.

<sup>153</sup> KEETON ET AL., *supra* note 14, § 55 at 367-73.

with an infliction as opposed to no life at all.<sup>154</sup> Like some of the other no duty rules listed, no duty rules relating to the unborn have also eroded to allow precise consideration in particular cases.

All of these no duty rules represent areas in which tort law provided certainty and predictability through rules. Another area where one traditionally saw some precise rule making in tort law was in the area of immunities. At common law, there was sovereign immunity,<sup>155</sup> intrafamily immunity,<sup>156</sup> and charitable immunity.<sup>157</sup> Like the no duty rules discussed above immunities protected defendants from liability. The basis of the protection was the defendant's status. The immune defendant occupied some status which insulated it from having its particular conduct second guessed by judges and juries in discrete tort cases. Defendants' status preempted a detailed consideration of the facts of particular cases. But now with the large scale abrogation<sup>158</sup> of each of these immunities, governmental entities, parents, and charities are all forced into litigating over the details of their acts and the acts' effects.

Both the no duty rules and the immunity rules share several things in common. First, they all resulted in *no* liability. They protected defendants. Second, we have seen an erosion of almost all of them. Hard cases have presented themselves to courts and courts chipped away at what was once a protective cloak for certain defendants who caused certain categories of injuries. Third, and most important of all, both the no duty rules and the immunities resulted in a broad determination, in some large class of cases, that the defendant was not liable. This no liability determination could be made without a trial either through a decision that the plaintiff stated no cause of action or through a decision the defendant was entitled to summary judgment. It was *not* necessary for the court to hear the facts of the particular case. The no liability determination shielded the relevant class of defendants from having to undergo the case specific litigation process which otherwise characterizes negligence cases in particular and tort cases in general. That is, because the defendant caused some type of damage, such as emotional distress or purely economic loss, or because the defendant failed to act, or because of who the defendant was (i.e., status), the court decided the case based on some broad basis which was not unique to the facts before the court. The court dismissed the case because of the class of injury suffered, the generic relationship between the parties (no privity), or because of the defendant's status. As noted, these broad no recovery rules short-circuited the

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<sup>154</sup> *Id.* at 370-71.

<sup>155</sup> *Id.* at 1033.

<sup>156</sup> DOBBS, *supra* note 19, at 398-402.

<sup>157</sup> KEETON ET AL., *supra* note 14, § 133 at 1069-70.

<sup>158</sup> DOBBS, *supra* note 156, at 398-443.



normally case specific, detailed, dramatic progression of the tort case. These broad no recovery rules created some tension between a system where the parties told their stories and those stories were resolved by the factfinder/decisionmaker as a matter of fact/law based on a common sense of fairness or justice, and a system where liability was denied because of some broad rule.

As noted, in the 50s and 60s tort law witnessed a general erosion of these no recovery rules. These rules gave way in specific cases to particular exceptions;<sup>159</sup> in some cases eroding the rule almost entirely (i.e., privity).<sup>160</sup> There is more than one explanation for this development. Many who wrote for the abrogation of certain rules, such as the privity requirement, contended that manufacturers were generally better risk spreaders than the plaintiffs they injured.<sup>161</sup> The risk spreading, or enterprise liability, justification for expanded duty rules for manufacturers is, like the no recovery absent privity rule that it replaced, based on general conceptions regarding the ability of manufacturers, in general, to spread risk through access to markets or insurance. That reason is just as inconsistent as the no duty rule with the dramatic, case specific role I have mapped for torts. However, the erosion of privity is consistent with society's preference for having product liability cases decided on a case-by-case, fact specific basis.

Predictably, with the erosion of broad no duty rules came an assault upon the vague, doctrinally defiant, generality of tort law. The tort reform movement of the 70s and 80s, in retrospect, was an attempt to return, at least on some level, to a more rule oriented tort system. For instance, caps on general damages or caps on recovery in certain types of cases now control the tort factfinder's ability to tailor the damages awarded to the facts of the particular case.<sup>162</sup> Caps are a limit on the decision maker's ability to achieve a fact specific compensatory damage award in certain classes of cases. Moreover, product liability reform, both at the state and national level, has attempted to limit the scope of a manufacturer's duty to an injured consumer through the imposition of heightened burdens of proof.<sup>163</sup> For instance, the proposed Restatement (Third) of Product Liability would require a plaintiff, in almost every design defect case, to allege that some alternative safer design existed.<sup>164</sup> That is, before the factfinder would be allowed to consider the details of the particular case, the plaintiff would be required to show some

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<sup>159</sup> *Id.* at 158-159.

<sup>160</sup> *See, e.g.,* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

<sup>161</sup> *See, e.g.* William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

<sup>162</sup> *See* DOBBS, *supra* note 156, at 792-94.

<sup>163</sup> *See* RESTATEMENT (THIRD) OF TORTS-PRODUCTS LIABILITY § 2 (Tentative Draft No. 1, 1994).

<sup>164</sup> *Id.* at § 2(b).

alternative safer design for the product in question.<sup>165</sup> Thus, tort reform has, for the most part, manifested itself in a desire to protect defendants while achieving certainty. Most importantly for present purposes, "rules" deny the freedom of the factfinder to decide the particular case before it based upon the relevant factfinder's sense of fairness.

One might also argue that the development, from the plaintiff's perspective, of large scale class actions in tort cases is inconsistent with the model of tort litigation posed here. That is, in large class actions the decision maker does not consider the details of particular plaintiff's cases but rather considers the effect the defendant's action had on a class of plaintiffs. The particular plaintiff gives way to the class so that litigation becomes structural rather than personal.<sup>166</sup> Of course, one might argue this is the inevitable result of a more technologically complex society. However, while it is no doubt true that class action litigation moves away from the individual, it is also true that one of the methods for handling class action litigation is to select certain representative plaintiffs who are allowed to present their versions of their cases to the relevant decision maker. These representative plaintiffs push their own case as if it was a traditional tort case. The individuals act as proxies for the other plaintiffs who are similarly situated. The representative plaintiff plays the role of the particular plaintiff for the court in the particular law suit. The particular plaintiff allows the court to deal with the complex matter in a method akin to the traditional face-to-face, one-on-one tort case.

Where are we then? The purpose of this short section has been to point out that indeed, there are, or have been, some "rules" in tort cases. These rules can be applied evenhandedly in an apparently rational manner. Interestingly, most of these rules traditionally resulted in no recovery. Importantly, all of these rules deny the plaintiff his or her right to tell his or her particular story to the particular factfinder whose job it is to decide the case. These rules deny the parties the opportunity, in the particular case, to present their particular narratives against the backdrop of the normally general and vague standards of tort law. Put differently, these rules result in limiting the power of the relevant decision maker to apply its sense of justice, fairness, and dramatic resolve to the details of the particular case. The detail of the particular case, normally the predominate factor in any personal injury action, gives way to the generalities out of which the particular legal rule arose. While many of these rules have eroded, or disappeared entirely, the phenomena of tort reform and complex litigation have presented us with new set of challenges to the vague particularity of tort law.

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<sup>165</sup> See also La. Rev. Stat. Ann. § 9:2800.56(1) (West 1995).

<sup>166</sup> On structural litigation generally see Owen M. Fiss, *The Supreme Court 1978 Term- Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

## VI. TRAGEDY IN TORTS

In a play, the actors say their lines; the plot unfolds. The audience watches. The audience focuses on the detail of the dramatic presentation. It becomes involved with the characters. No doubt, the audience has hopes and wishes for happy endings or just desserts. However, when the play is over, if it is successful as a dramatic form, the audience, which was focused on the detail of the production, begins to abstract from the characters and their particular situations.

The audience, through its focus upon the detailed experiences of the particular characters who populated the play, may gain some more general insight into the literary vehicle, human nature, or life. Perhaps by focusing on the particular personae populating the production the audience learned something about itself. The lessons for the audience may be individual, (I learned something about my own nature), communal (I learned something about the community of which we are all apart) or metaphysical (so that's the meaning of life after all). As such, the audience may have come to see some common link between the characters portrayed and themselves. By seeing this common link, the audience may, in fact, see some commonality between all humanity, what Professor Bender calls our "interconnectedness."<sup>167</sup> The purpose of the literary vehicle then, in part, is to make one aware of interconnectedness via the rich presentation of detail about a particular character. It is my contention that the richer the detail the more realistic the character appears. The more realistic the character, the more likely one is to see the impact of life on that person, thereby learning some larger lesson which applies not just to that person but to all of us. Thus, ironically, the focus on detail leads to a lesson of universal application.

Now, let me note some general points regarding the dramatic form known as tragedy. The laymen may think of tragedy as something sad or to be regretted. However, the dramatic theorist is not so sentimental. Professor Richard H. Palmer defines tragedy as follows: "Tragedy is a dramatic form that stimulates a response of intense, interdependent, and inseparably balanced attraction and repulsion."<sup>168</sup> Let me focus on what Palmer calls the inseparably balanced attraction and repulsion which he also calls the "ambivalent" response.<sup>169</sup> The ambivalence in the tragic form is that the drama evokes a feeling in the audience that is inevitably inconsistent. That is, the feeling calls up elements in opposition. It calls up mutually repugnant forces. Perhaps, tragedy is a dramatic form which shows us that opposites attract. It

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<sup>167</sup> See Bender, *supra* note 60, at 28-30.

<sup>168</sup> RICHARD H. PALMER, TRAGEDY AND TRAGIC THEORY: AN ANALYTICAL GUIDE, 120 (1992).

<sup>169</sup> *Id.* at 11.

is a dramatic form that induces a feeling of positive and negative, yin and yang, good and bad. That is, it reduces itself to some mutually independent, inconsistent, dialectal.<sup>170</sup>

The tragic form presents the audience with conflicting feelings which, while rationally irreconcilable, still may evoke some conciliatory response in the observer who realizes, through the art form, that apparent irreconcilability is merely a tangible incarnation of some greater whole.

Let me return to the quote from Ms. Armstrong which I set forth in the Introduction. You will recall Ms. Armstrong stated that tragedy "effected a purification (catharsis) of the emotions of terror and pity that amounted to an experience of rebirth."<sup>171</sup> The audience is reformed by some reconciliation of inconsistent emotions through the observation and study of the drama. The observer is able to see some "truth," a religious truth according to Ms. Armstrong, via "a symbolic, mythical or ritual presentation of events that would be unendurable in daily life."<sup>172</sup> Now, let me return to personal injury litigation.

Personal injury cases, as I noted at the beginning, are frequently compelling. Like the best stories, they draw out the detail of the case. Society observes, like the audience at a movie or play. This is even true of the reader of the appellate opinion. It is most definitely true for the juror observing the personal dramas unfolding. The feelings evoked by the facts of tort cases are often intense. Moreover, the parties present their cases in a form akin to the dramatic. The plaintiff brings his or her witnesses and presents their testimony. The defendant follows suit. The presentation is a real life drama. Where does the tragedy come from? Where is the ambivalent? The ambivalence comes from the inevitable resolution of conflicting views of the evidence and of the just outcome. The plaintiff's presentation pulls at the emotions and sensibilities of the jury in one direction. The defendant's presentation tugs at those same emotions and sensibilities in a different direction. Like the audience in any tragedy, the jury is pulled in two different directions at once. The particular details of the personal injury drama before them pulls individual jurors in different directions. It forces them to resolve the contrary forces at work in the courtroom. Resolution has its practical manifestation in the decisionmaker's judgment in the particular case. That resolution is concrete; it is not metaphysical.

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<sup>170</sup> Thus, in *THE BIRTH OF TRAGEDY*, Nietzsche deals with the innately conflicting Apollonian and Dionysian forces. See, e.g., FRIEDRICH W. NIETZSCHE, *THE BIRTH OF TRAGEDY* (1974) (dealing with the innately conflicting Apollonian and Dionysian forces); see also DAVID LENSEN, *THE BIRTH OF TRAGEDY—A COMMENTARY* (1987).

<sup>171</sup> ARMSTRONG, *supra* note 4, at 37.

<sup>172</sup> *Id.*

Interestingly, Professor Ernest Weinrib of the University of Toronto, in a series of recent articles, has turned to Aristotle to provide a formal theory of modern tort law.<sup>173</sup> According to Weinrib, tort law may be explained by Aristotelian notions of corrective justice, the purpose of tort law being to restore the parties to their pretort transactional equality.<sup>174</sup> Tort law strives to restore the parties to an equality of holdings.<sup>175</sup> Importantly, Weinrib points out that one of the key characteristics of corrective justice (and tort law) which arises out of Aristotle's conception of corrective justice is the bi-polarity of tort litigation.<sup>176</sup> This bi-polarity manifests itself in the bi-polarity of the parties<sup>177</sup> and the bi-polarity of the remedy.<sup>178</sup> Interestingly, it is Aristotle's classic theory of tragedy which Ms. Armstrong cited in the material I quoted in the Introduction and have referred to in this section. It is Aristotle who pointed out the importance of the cathartic experience brought about by the seemingly opposite emotions of pity and terror. Thus, there is a bi-polarity between pity and terror which bi-polarity is resolved, albeit metaphorically, in the tragedy. Likewise, in the tort case, there is a bi-polarity between the plaintiff and defendant, which is resolved through the decisionmaker's resolution of the particular case.

But how do the general standards, as opposed to particular rules of tort law, come into play? What allows the jury to resolve the bi-polar puzzle which the tort case presents to it in a meaningful manner is the generality of the applicable rules. Thus, the jury, or other relevant decision-maker is not bound by some particular legal dogma. Rather, the decision maker is asked to apply generalized standards to the details of the cases before it. The decision maker is resolving what at first blush would appear to be irreconcilable. As a result, being able to think metaphorically,<sup>179</sup> and not merely logically, has

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<sup>173</sup> See, e.g., Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L. J. 277 (1994).

<sup>174</sup> See, e.g., Weinrib, *supra* note 18, at 407-09.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 409-11.

<sup>177</sup> *Id.* at 409.

<sup>178</sup> *Id.* at 410.

<sup>179</sup> See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Fletcher says:

Metaphors and causal imagery may represent a mode of thought that appears insufficiently rational in an era dominated by technological processes. Yet why should the rhetoric of reasonableness and foreseeability appeal to lawyers as a more scientific or precise way of thinking?

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The courts face the choice. Should they surrender the individual to the demands of maximizing utility? Or should they continue to protect individual interests in the face of

some benefit. The standards of tort law tolerate and allow metaphoric thinking and application. Metaphoric application leads to resolution and perhaps to some greater truth.

Let me now step back. I have focused on the decisionmaker as the audience in a personal injury drama. This is most definitely true. However, in another sense, the decisionmaker may be more like the chorus in a Greek tragedy, the character with no name, the character who helps the viewing audience gain some further insight into whatever aspect of human nature that was brought to the surface by the tragedy. Who then is the audience? Viewed thusly, the tort audience is the society which observes the entire proceeding, including the result reached by the decision maker/chorus. In short, personal injury law mirrors a dramatic form where the ambivalent forces at work in a dangerous society play themselves out. It is the arena where progress is balanced against personal injury. It is the forum where values collide.

The generality of the standards normally employed in tort law allows both the decisionmaker and the society to flexibly respond to the compelling details of particular tort cases as they arise. To the extent general standards are replaced by particular rules or to the extent we tend to focus on broad classes of individuals, as plaintiffs or defendants, rather than as particular individuals before the court, we run grave risks.

To the extent we abandon the rich, specific detail of tort litigation for rules or for class litigation we run the risk of missing the depth of the fabric of personal injuries that particular detail provides. The abstraction from the particular to the general becomes meaningfully possible only when the particular is painted with sufficient detail to make it compelling. The compassionate response of the community depends upon an empathic response to the relevant actors. The response increases as we see those actors, characters, or parties, as living, breathing, real persons like ourselves. Particularity breeds generality. Alternatively, generality without particularity may well breed isolation and apathy.

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community needs? To do the latter, courts and lawyers may well have to perceive the link between achieving their substantive goals and explicating their value choices in a simpler, sometimes metaphoric style of reasoning.

*Id.*

